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Supreme Court of the United States

October Term, 1973

RAY BAILLIE TRASH HAULING, INC.,
LEONARD SANTO, d/b/a L & J WASTE SERVICE,

and

G. LEWIS JONES, d/b/a
SOUTH FLORIDA SANITATION COMPANY OF
DADE COUNTY, INC.,

Petitioners,

v.

THOMAS S. KLEPPE, Administrator
SMALL BUSINESS ADMINISTRATION,

ROBERT C. SEAMANS, JR., Secretary
DEPARTMENT OF THE AIR FORCE,

ALL AMERICAN WASTE, INC.,

and

MAJOR JACK FORD

**Petition For a Writ of *Certiorari* To
The United States Court of Appeals
For The Fifth Circuit**

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INDEX

	Page
OPINIONS DELIVERED BELOW	1
JURISDICTIONAL GROUNDS	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS	3
STATEMENT OF THE CASE	11
DISTRICT COURT JURISDICTION	17
ARGUMENT	17
Standing To Litigate	19
Congressional Authorization	26
Constitutional Issues	35
CONCLUSION	38

CITATIONS

Cases:

American Trucking Ass'n. v. Atchison Ry, 387 U.S. 397	33
Assoc. of Data Processing Orgs. v. Camp, 397 U.S. 150	22
Ballerina Pen Company v. Kunzig, 433 F.2d 1204	39

Page

Barlow v. Collins,
397 U.S. 159 22

Bolling v. Sharpe,
347 U.S. 497 35

Flast v. Cohen,
392 U.S. 83 22

Fortec Constructors, Inc. v. Kleppe, unreported 17

Frost v. Corporation Commission
378 U.S. 515 35

Gonzales v. Freeman,
334 F.2d 570 (C.A.D.C. 1964) 38

Griggs v. Duke Power Co.,
401 U.S. 424 21

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 24

New York Mail & News. Transp. Co. v. United States,
139 Ct.Cl. 751 29

Paul v. United States,
371 U.S. 245 29

Scanwell Laboratories, Inc. v. Shaffer,
424 F.2d 859 25

Schoenbrod v. United States,
187 Ct.Cl. 627 29

Sierra Club v. Morton,
405 U.S. 727 22

Page

Trafficante v. Metropolitan Life Ins.,
409 U.S. 205 25

United States v. Amer. Trucking Ass'ns.,
310 U.S. 534 34

Constitution, Statutes, Executive Orders and Regulations:

United States Constitution, Amendment V, XIV 3
10 U.S.C. §2304 27
15 U.S.C. §631 28
15 U.S.C. §632 28
15 U.S.C. §637(a) (Section 8(a)) 4, 26
15 U.S.C. §644 37
41 U.S.C. §251 . . . . . 7, 28
41 U.S.C. §252 27
42 U.S.C. §2000(d) 37
42 U.S.C. §2901 . . . . . 5, 26
42 U.S.C. §2906 . . . . . 6, 26
42 U.S.C. §2949(2) 6, 26

Defense Production Act of 1950, as amended 1951 . . . 30

Economic Opportunity Act, Amendments of 1967 . . . . 5, 26

First War Powers Act of 1941 (55 Stat. 839) 30

Small Business Act of 1953 (67 Stat. 232) 31

Small Business Act of 1958 (72 Stat. 384) 32

Small Business Act Amendments of 1958 . . . . . 4, 32

Executive Order 11458, issued 5 March 1969
(34 Fed. Reg. 4937) . . . . . 35, App. 93(a)

Page

Executive Order 11518, issued 20 March 1970, (35 Fed. Reg. 4939) . . . . . 35, App. 95(a)

Executive Order 11625, issued 13 October 1971, (36 Fed. Reg. 11967) . . . . . 35, App. 98(a)

13 C.F.R. 121 (SBA Regulations) 12

13 C.F.R. 124.8 7

13 C.F.R. 127 12

41 C.F.R. (Federal Procurement Regulations) 28

A.S.P.R., Sections 1-300.1, 1-300.3, 1-702(b), 3-102(c) . . 27

Miscellaneous:

Senate Report No. 1714, 16 June 1958 32

SBA Report to House Banking and Currency Committee (May 1957) 32

Report to the President by the President's Advisory Council on Minority Business Enterprise, 22 February 1971 19

Program Report, The Minority Enterprise Program (October 1972), Department of Commerce 18

Appendix:

Order denying Rehearing, 18 June 1973 . . . . . 1(a)

Opinion, filed 18 April 1973, Fifth Circuit . . . . . 3(a)

Opinion, filed 5 January 1973, Fifth Circuit. . . . . .31(a)

Page

District Court Judgment, Findings and Conclusions, filed 29 October 1971 . . . . . .59(a)

Petition for Rehearing, Fifth Circuit . . . . . 76(a)

Appendix to Petition for Rehearing . . . . . 86(a)

SBA Regulation, 8(a), effective 20 November 1970 . . 90(a)

SBA Regulation, 8(a), effecitve 25 May 1973. . . . . 91(a)

Executive Order No. 11458, 5 March 1969. . . . . 95(a)

Executive Order No. 11518, 20 March 1970 . . . . . 97(a)

Executive Order No. 11625, 13 October 1971 . . . . 98(a)

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**Petition For a Writ of *Certiorari* To
The United States Court of Appeals
For The Fifth Circuit**

OPINIONS DELIVERED BELOW

The judgment filed by the United States District Court for the Southern District of Florida, including Findings of

Fact and Conclusions of Law, is reported in 334 F.Supp. 194, and may be found in the attached Appendix at page 59(a).

The opinion of the United States Court of Appeals for the Fifth Circuit dated 5 January 1973, later withdrawn, is unreported (App. at page 31(a)).

The opinion of the Fifth Circuit, dated 18 April 1972, which withdrew the earlier opinion, is reported in 477 F.2d 696 (App. at page 3(a)).

The order of the Fifth Circuit denying Petitioners' petition for a rehearing was entered without opinion on 18 June 1973, 477 F.2d 696 (App. at page 1(a)).

JURISDICTIONAL GROUNDS

Petitioners seek to review the decree of the Fifth Circuit, 477 F.2d 696, entered on 18 April 1973, reversing a judgment previously entered in favor of Petitioners in the United States District Court for the Southern District of Florida on 29 October 1971.

Rehearing was denied by the Fifth Circuit on 18 June 1973 (477 F.2d 696).

On 7 September 1973, Mr. Justice Rehnquist entered an order extending Petitioners' time for filing a petition for writ of *certiorari* to and including 17 October 1973.

This Court has jurisdiction to review the matter pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Do Petitioners, small business concerns as defined in the Small Business Act, 15 U.S.C.A. §631, *et seq.*,

have standing to litigate their exclusion solely on criteria of race, color and origin from a small business Federal procurement program carried on by the Small Business Administrator and Federal procuring agencies under color of Section 8(a) of the Small Business Act? 15 U.S.C. 637(a)

B. Has Congress authorized the Administrator, with the cooperation of other Federal agencies, to operate this program, hereinafter referred to as the "8(a) program", and under it to make contract awards privately and solely to concerns hand-picked on criteria of race, color and origin?

C. May the Administrator, acting in concert with the procuring agency, assist in the establishment and financing of such a concern and privately award it Federal contracts at premium prices for the purpose of establishing it as an effective commercial competitor against similarly situated firms which have been intentionally excluded from the benefits of the program?

D. Is the 8(a) program as operated by the Administrator violative of Petitioners', and similarly situated excluded small business concerns', rights under the Constitution (Fifth and Fourteenth Amendments) to due process and equal protection of law?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Involved are the following Amendments to the Constitution of the United States, in pertinent part:

> *Amendment V:* ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment XIV:

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved are the following statutes of the United States, in pertinent part:

Small Business Act, Section 8(a) 15 U.S.C. 637(a):

(a) It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary–

(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and

(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

Economic Opportunity Act of 1964, as amended, P.L. 90-222, December 23, 1967; Title 42, U.S.C.:

SUBCHAPTER IV. EMPLOYMENT AND INVESTMENT INCENTIVES

§2901

It is the purpose of this subchapter to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.

§2906

The Administrator of the Small Business Administration shall take such steps as may be necessary to insure that, in any fiscal year, at least 50 per centum of the amounts loaned or guaranteed pursuant to this part are allotted to small business concerns located in urban areas identified by the Director, [Office of Economic Opportunity] after consideration of any recommendations of the Administrator of the Small Business Administration, as having high concentrations of unemployed or low-income individuals or to small business concerns owned by low-income individuals. The Administrator of the Small Business Administration, after consideration of any recommendations of the Director, shall define the meaning of low-income as it applies to owners of small business concerns eligible to be assisted under this

part, and such definition need not correspond to the definition of low-income as used elsewhere in this chapter.

§2906c

(a) The Administrator of the Small Business Administration shall take such steps as may be necessary and appropriate, in coordination and cooperation with the heads of other Federal departments and agencies, so that contracts, subcontracts, and deposits made by the Federal Government or in connection with programs aided with Federal funds are placed in such a way as to further the purposes of this subchapter.

(b) The Administrator of the Small Business Administration shall provide for the continuing evaluation of programs under this section and the results of such evaluation together with recommendations shall be included in the report required by section 2948 of this title.

§2949 Definitions

As used in this chapter –

(1) . . .

(2) the term "financial assistance" when used in subchapters I and II of this chapter, part B of subchapter III of this chapter, subchapter IV of this chapter, and part B of subchapter V of this chapter includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant or equipment, or goods or services;

Also involved is the statute declaring Congressional procurement policy, Title 41, Section 251(1), P.L. 91-129, November 26, 1969, 83 Stat. 269, which provides in pertinent part:

Section 1. It is hereby declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government by –

(1) establishing policies, procedures, and practices which will require the Government to acquire goods, services, and facilities of the requisite quality and within the time needed at the lowest reasonable cost, utilizing competitive bidding to the maximum extent practicable;

SBA REGULATIONS

The applicable regulation of SBA is found in Part 124 – Procurement and Technical Assistance, Section 124.8 (Title 13, CFR). In pertinent part, the text of the regulation follows:

(a) When SBA privately instituted in 1968 the program now being litigated, its Section 8(a) regulation read, effective 31 December 1958, 23 F.R. 10525:

§*124.8-1* (a) Section 8(a)(1) and (2) of the Small Business Act authorizes SBA to contract with any department or agency of the United States Government for the furnishing of articles, equipment, supplies or

materials and to subcontract with small business concerns or others for the performance of such prime contracts.

(b) This prime contracting authority has been placed on a standby basis and will be activated as required to protect the interests of small business.

§124.8-2 (a) During periods of emergency determined by the Administrator to warrant exercise by SBA of its prime contract authority, SBA will review procurement plans and programs of other Government departments and agencies to determine the contracts for property, equipment, supplies, or materials which SBA should undertake to furnish to the Government through the exercise of its prime contracting authority. Upon making such determination, SBA will make the certification provided for in section 8(a)(1) of the Small Business Act and will enter into a formal contract with the procuring agency. Thereafter, SBA will widely publicize its requirements and fully utilize its facilities listing in soliciting bids or proposals. Awards will then be made to the best qualified supplier, price and other factors considered.

(b) Standard Government procurement contracts, forms and procedures applicable to civilian agencies in effect at the time of such contracting will be utilized by SBA in making prime contracts or subcontracts.

(c) SBA personnel will furnish such advice and technical assistance to subcontractors as

may be necessary to assure necessary completion of subcontracts made by SBA.

(b) Effective 20 November 1970, SBA for the first time caused its regulation to reflect its program for "socially or economically disadvantaged persons" which it had been by then operating covertly for approximately two years. At this time it redrew the regulation in the form which appears in full in the Appendix at page 90(a); 35 F.R. 17833. In pertinent part, the regulation was changed to read as follows:

§ 124.8-1 Introduction

(a) General Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and subcontract the performance of such contracts.

(b) Purpose. It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace.

(c) Eligibility. To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for

divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

(c) Effective 25 May 1973, the regulation was amended in its present form, 38 F.R. 13729. The complete regulation is set forth in the Appendix at page 91(a). In pertinent part, the regulation now reads:

§ 124.8-1 The 8(A) Program

(a) General. – These regulations implement section 8(a) of the Small Business Act (15 U.S.C. 637(a)) which authorizes SBA to enter into all types of contracts (including, but not limited to, supply, services, construction, research and development) with other Government departments and agencies and negotiate subcontracts for the performance thereof.

(b) Purpose. – It is the policy of SBA to use such authority to assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the market place.

(c) Eligibility. – (1) Social or economic disadvantage. An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive

> position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include but are not limited to, black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. Vietnam-era service in the Armed Forces may be a contributing factor in establishing social or economic disadvantage.

Also involved are Executive Orders No. 11458, 5 March 1969, 34 F.R. 4937; No. 11518, 20 March 1970, 35 F.R. 4939; and No. 11625, 13 October 1971, 36 F.R. 19967. The text of these Orders, insofar as applicable, will be discussed *infra*. The Orders are contained in the Appendix at pages 93(a) - 102(a).

STATEMENT OF THE CASE

Petitioners, small "white" refuse collecting concerns in Miami, brought this suit on 29 June 1971 in the United States District Court for the Southern District of Florida for a declaratory judgment and injunctive relief. They named as defendants the Administrator of the Small Business Administration, the Secretary of the Department of the Air Force, the Contracting Officer assigned to the Homestead Air Force Base (Florida), and All American Waste, Inc., a "black" firm located in Miami, Florida.

Defendants, during argument on Petitioners' motion for a temporary restraining order, advised the District Court that they did not dispute the facts alleged in Petitioners' verified complaint, which set forth, *inter alia* the following representations:

Petitioners are small independent firms engaged in the business of collecting refuse within the Miami metropolitan area and in hauling the refuse to disposal sites. Each Petitioner is a "small business concern" as defined by applicable statute (Small Business Act, 15 U.S.C.A. §631, 632) and the regulations of SBA (13 C.F.R. 121 (Code of Federal Regulations));

In its most recently completed fiscal year Petitioner Ray Baillie Trash Hauling Company, Inc., had gross revenues of approximately $75,000; Petitioner Santo, approximately $155,000; and Petitioner Jones, hereinafter referred to as "Jones", approximately $125,000. Defendant All American had gross revenues, including the disputed subcontract, of approximately $100,000;

Homestead Air Force Base, Homestead, Florida, is a facility of the Department of the Air Force, and subject to the direction, supervision and control of defendant Secretary of the Department of the Air Force. Prior to the events now in issue, the Base had annually advertised for competitive bids with respect to the service of collecting and removing refuse accumulated on the Base. Acting on the request of the Small Business Administration (SBA) in previous years, the Base had "set aside" this procurement for small business concerns as defined by the Administrator, and had limited its invitations for bid, and contract awards, to such small business concerns, in accordance with statute and applicable regulation (15 U.S.C.A. §644; 13 C.F.R. 127). The contract thus offered annually by the Base for competition represented a recurring Government contract upon which small business concerns in the area, such as Petitioners, depend for a significant part of their revenue;

In 1968 Petitioner Jones was the successful bidder and received a contract award from Homestead for an annual price of $42,245.00. In 1969 Petitioner Santo was the successful bidder and received a contract award from Homestead for an annual price of $49,116.00;

In 1970, after the event occurred, Petitioners learned that the defendant Administrator and defendant Secretary had privately arranged to reserve the Homestead contract for defendant All American, by the Department of the Air Force awarding a prime contract to SBA for $65,000, and by SBA in turn awarding a subcontract to defendant All American at the identical price. This award was made to defendant All American in May 1970, without public notice and without prior notice of any kind to plaintiffs and other small businesses similarly situated, "white" or "black;"

The $65,000 price awarded to defendant All American includes a premium designed to enhance its competitive position against Petitioners and other similarly situated small business concerns for commercial business accounts. Subsequent to the first contract award to it, defendant All American by offering lower prices to three of Petitioner Baillie's commercial customers took these accounts for itself, thus causing Petitioner Baillie to lose monthly gross revenues of approximately $6,000, or approximately 40% of its gross revenues;

Defendant All American was formed and began operations in 1970 solely through financial aid and other assistance extended to it by defendants Administrator and Secretary, which included the private award to it of the Homestead subcontracts at premium prices in 1970 and 1971;

Upon learning that defendants Secretary and Administrator were planning to repeat an award to defendant All American for fiscal year 1971, beginning 1 July 1971 and ending 30 June 1972, plaintiffs demanded an opportunity to compete for the contract award. Their demands were rejected, and on 22 June 1971, defendants Administrator and Secretary effected a second contract award to defendant All American at the premium price of $65,000. By agreement of the parties, performance under this second award was suspended pending the litigation, and defendant All American was permitted to continue to serve Homestead by an extension of the term of the 1970 award, subject to the order of the District Court.

Defendants advised the District Court that they did not dispute Petitioners' allegations, and asserted that their transactions with All American, including the private placement of contracts with it, were authorized by Section 8(a) of the Small Business Act, 15 U.S.C. 637(a) and SBA's "8(a)" Regulation, effective 20 November 1970 (App. at page 90(a)).

Acting in reliance upon defendants' representation that they did not dispute Petitioners' allegations, the District Court ordered briefs on the questions of law presented. Thereafter, defendants moved to dismiss the complaint, and in the alternative, for summary judgment, and submitted material in support of these motions. Petitioners opposed the motions, and moved for summary judgment in their favor with supporting material.

Having considered the issues fully, the District Court filed on 29 October 1971 its Findings of Fact, Conclusions of Law and Judgment, 334 F. Supp. 194 (App. at pages 59(a)-75(a)). Ruling in favor of Petitioners, it held that the subcontracts awarded by defendant Administrator

to defendant All American were unauthorized by law and unconstitutionally violated Petitioners' rights, and directed that the Homestead services be contracted for as soon as possible on the basis of the maximum competitive bidding practicable among plaintiffs and other similarly situated small business concerns.

It should be noted that typographical errors in the judgment of the District Court (Findings 17 and 18) give the effective date of the original 8(a) regulation as "31 December 1968" (App. at pages 66(a) - 67(a)). The correct date is set forth in Finding 23 as follows: "In the circumstances, the original 8(a) regulation promulgated by SBA, effective 31 December 1958 (Finding 17) . . ." (App. at page 69(a)).

The Fifth Circuit in its first opinion, 5 January 1973 (App. at page 31(a)), overruled the District Court's findings of fact on two critical points:

> (a) It held not proved the findings that Petitioners are effectively barred from sharing in the benefits of the 8(a) program by reason of race and color; and
>
> (b) It overruled the findings that defendants were paying All American a premium price, and actively assisting it by means of their lending and contracting powers for the purpose of enhancing its viability and competitive position generally as against Petitioners and other similarly situated, excluded small business concerns; and that the basis for so favoring defendant All American is the race or color of the individual owning or controlling it.

Moving for a rehearing, Petitioners brought to the attention of the Fifth Circuit additional support for the District Court's findings; *i.e.*, unequivocal admissions on 13 August 1972 by the Deputy Administrator of SBA that: "Almost a hundred percent of recipients of aid on contracts [8(a)] are minority enterprises," and "It costs us eight to ten percent more. This is a hard, plain fact, that the Federal government pays a premium to use the 8(a) approach as opposed to the competitive-bid approach." (App. at page 88(a)).

Faced with this indisputable proof, the Fifth Circuit withdrew its opinion of 5 January 1973, and substituted its opinion of 18 June 1973 (App. at page 3(a)). In the present posture of the case, therefore, the issues now before this Court rest upon the undisturbed findings of the District Court in these respects; *i.e.*, that "whites" or "non-minority" small business concerns are excluded from the 8(a) program on racial grounds, and that "minority" firms are paid premium prices for the purpose of enhancing their capabilities to compete in the commercial sector against excluded firms.

Faced with unavoidable proof that SBA's "socially or economically disadvantaged" eligibility criteria in truth camouflaged wholly racial standards, the Fifth Circuit recast its opinion on the constitutional issues of equal protection and due process. It discarded its initial rationale for one which avoided constitutional issues by denying Petitioner standing to raise them (*cf.* opinions at App. 28 (a) and 52(a)).

The issues now squarely presented for consideration by this Court may be succinctly summarized as follows:

> A. May a Federal contracting program in which eligibility is determined on the basis

of race, color or origin be shielded from scrutiny on constitutional grounds, by denying standing to those intentionally excluded from the benefits of the program?

B. May it reasonably be said that the Congress, which has painstakingly avoided racial criteria in all of its socio-economic legislation, has in this one instance authorized a program to be operated on racial criteria for eligibility?

Discussion of these and other issues are presented in the following ARGUMENT.

DISTRICT COURT JURISDICTION

The District Court had jurisdiction pursuant to the provisions of 5 U.S.C. 702, and 28 U.S.C. 1331, 1361, 2201, and 2202.

ARGUMENT

The Fifth Circuit has erroneously decided issues which gravely affects the livelihoods of those thousands of small business firms throughout the nation who are being systematically excluded solely on racial grounds from the benefits of a large and pervasive Federal procurement program.

The United States Court of Appeals for the District of Columbia, restricting itself solely to the issue of standing has also erroneously decided that issue. In *Fortec Constructors, et al. v. Kleppe, Administrator, et al.*, the District of Columbia Circuit affirmed the decision below, which found *inter alia* that the 8(a) program had been authorized by Congress, but "only to the extent that the

District Court properly ruled that appellants lacked standing to complain about the alleged discriminatory manner in which the Section 8(a) program they have declined to participate in is administered." (Unreported, 11 October 1972, Docket No. 72-1924; 350 F. Supp. 171).

Thus, two of the Circuits have denied standing to thousands of small business concerns, on the tortuous ground that they must first gain standing by seeking admission to a program which is dedicated by SBA to those of other races, colors and origins.

During fiscal year 1972 (30 June) SBA privately selected and placed under the program 1706 "8(a)" subcontracts, having a dollar volume of more than 151 million dollars. *Progress Report, The Minority Business Enterprise Program (October 1972), Department of Commerce, Office of Minority Business Enterprise*, pp. 16-17.

All of these private awards were withdrawn from the small business sector of the economy, and several thousand "non-minority" firms were thus deprived of any participation in a significant volume of business, in violation of the benefits created for them by Congress in the Small Business Act, 15 U.S.C. 631, *et seq.* As the *Progress Report* makes clear, SBA continues to enlarge the program, and consequentially to increase by thousands more the number of "white" firms adversely affected. For fiscal year 1973, the Deputy Administrator of SBA forecast that the "minimum will probably be $175 million." (App. 87(a)).

The 8(a) awards deal primarily with unsophisticated services, such as refuse hauling and building maintenance, or products which may be easily manufactured. Not surprisingly, many firms already exist to provide these services

and products. They are in the main marginal small business firms such as Petitioners which continue to exist only if they can survive the fiercest of economic pressures, and as such are the most in need of competitive opportunities granted to them by the Small Business Act and other statutes.

Ironically, because SBA operates the program on a completely private, hand-picked basis, some already established "minority" small firms also find themselves thus deprived of meaningful business opportunities. *Report, President's Advisory Council on Minority Business Enterprise* (22 February 1971), at page 40. Additionally, there are thousands of "minority" persons who have secured eligibility under the program, and found themselves waiting at the altar, while SBA covertly makes private arrangements with others under its entirely subjective cover-criteria of "socially or economically disadvantaged."

With such illusory criteria, SBA has found itself capable of issuing contract awards to "minority" persons with college degrees, including doctorates; to wealthy "minority" persons; and to "minority" persons used as fronts by others.

In its first opinion, the Fifth Circuit raised no issue with respect to legal standing. It denied relief to Petitioners on the ground that Petitioners "have not met this initial evidentiary burden", *i.e.*, of proving that the "8(a) program" is a racially based program from which "whites" are excluded, except on a token basis. It accepted, however, the rule that the initial burden is satisfied "where circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inference from established fact" (App. at page 54(a)).

Faced in the petition for rehearing with bald truths expressed by the Deputy Administrator of SBA (App. at pages 87(a) - 88(a)), the Fifth Circuit set up the roadblock of standing (App. at page 28(a)), to replace that of "not proved."

It is a matter of interest to note that the Department of Justice had raised the issue of standing in the District Court but abandoned it on appeal. Accordingly, the issue of standing was never briefed or argued in the Fifth Circuit.

It is, also, a matter of interest that the Department has to this day successfully avoided any testimonial hearing in the several suits that have been brought to litigate the authorization and operation of the 8(a) program. Whatever facts have surfaced about the program have appeared in grudging affidavits filed in such litigation, and in official publications primarily addressed to the "minority" population. Particularly revealing are the publications of the Department of Commerce, Office of Minority Business Enterprise, and they make it clear that the 8(a) program was devised and is operated for the exclusive benefit of "minorities". See *Progress Report, The Minority Business Enterprise Program*, October 1972; and, also, *Report, President's Advisory Council on Minority Business Enterprise*, February 1971.

The abandonment by the Fifth Circuit of its initial finding of "not proved" on Petitioners' claim that the program is based upon racial criteria, thus leaves undisturbed the District Court's finding that Petitioners and other "non-minority" small business concerns are "effectively barred from sharing in the benefits of such a program by reason of race and color," although they are similarly situated

with "minority" firms as small business concerns. (Finding 28, App. at page 71(a)).

The shibboleth of standing required by the Fifth Circuit is not only impossible of achievement by Petitioners and other "non-minority" small business concerns, but it is also arbitrarily restrictive of the doctrine of standing as enunciated by this Court.

It is a non-achievable standard adopted by the Fifth Circuit, because the program intentionally excludes "non-minority" firms, except on a token basis, from its benefits. To require "non-minority" firms to undertake the farce of applying for eligibility would reinstate a practice of which this nation happily rid itself, when the courts put an end to the practice of putting each "black" who suffered discrimination to the impossible task of inching his way through a hostile bureaucracy in the quixotic hope that he could convince an equally hostile court that his birthright was being denied on racial grounds.

The 8(a) program is a completely covert program. Even if the "non-minority" firm applies and receives token eligibility as "socially or economically disadvantaged," it would be impossible to prove in any single case that racial considerations led SBA to select the favored firm over the "non-minority" firm. Invidious discrimination in such circumstances can be exposed only by acceptance of what is now well-established law: that the pattern of conduct, and the results which flow from it, are determinative of the issue, whether the discrimination is invidious or legitimate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In the circumstances, therefore, the denial of standing leaves one with a feeling of *deja vu* – with the legal

postures of "blacks" and "whites" now reversed in a struggle for equal opportunity and treatment. Now it is the "white" small business which is encountering that judicial glaucoma which serves to screen out the fact of obvious invidious discrimination. A fact obvious in the market place somehow becomes a legal enigma in the courthouse. As "blacks" and other "minorities" were once faced with overwhelming burdens of proof with respect to their allegations of illegal discrimination in schools, in the jury box and in other areas, now it is the "white" small business firm which is faced with unrealistic evidentiary burdens.

STANDING TO LITIGATE ALL ISSUES

The denial of standing to the Petitioners with respect to the Constitutional issue of racial bias clearly runs counter to the prevailing view in this Court as set out in *Association of Data Processing Organizations, Inc. v. Camp*, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184; *Barlow v. Collins*, 1970, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed. 2d 192; *Flast v. Cohen*, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947; *Sierra Club v. Morton*, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed. 2d 636.

The denial is all the more perplexing, faced as it is in the same opinion with the granting of standing to Petitioners to litigate the questions of Congressional authorization for the program and of violation of due process in Federally-sponsored commercial competition. Standing in these respects is recognized by the Fifth Circuit, in the presence of injury suffered by Petitioners in the loss of competitive opportunity, in the loss occasioned by commercial competition assisted and sharpened by premium prices paid to the "minority" firm, and in the loss of benefits generally prescribed in the Small Business Act for

small business concerns as a class (App. at pages 9(a) - 10(a)).

With respect to the single Constitutional issue of racial bias, however, the Fifth Circuit balks, viewing it as severable insofar as standing is involved. We respectfully submit that the judicial scalpel is not keen enough to permit such surgical artistry. All of the issues are so intertwined that standing for any one of them necessarily includes standing to litigate all of them. Having successfully grasped the nettle of Congressional authorization, the Fifth Circuit had, also, within its reach all of the issues, including that of racial bias.

If Congress authorized the 8(a) program, as the Fifth Circuit has found, it follows that it authorized a racially-biased program camouflaged by cover criteria of "social and economic disadvantage." It will not do to say, as the Fifth Circuit seems, that although Congress has authorized a racially-biased program, Petitioners can create standing for themselves only by seeking to participate in a program from which the District Court has found they "are effectively barred . . . by reason of race and color", a finding left undisturbed in the second opinion of the Fifth Circuit. If Petitioners are intentionally excluded from the beneficiary class, it is just this act of exclusion which gives them standing to litigate the question of equal protection, as well as that of due process.

Indeed, the fallacy in the reasoning of the Fifth Circuit is made obvious by its language in denying standing with respect to this one critical issue:

> The plaintiffs never applied for participation in the section 8(a) program. Furthermore they do not even contend that they are socially

> or economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.

One may reasonably ask why, if this is a valid rationale, the Fifth Circuit did not apply it also to the question of Congressional authorization and due process. As the matter stands, it is quite obvious that the Fifth Circuit's opinion encompasses two rationales, each in mortal conflict with the other. We respectfully submit that the Fifth Circuit's reasoning with respect to standing to litigate the issues of Congressional authorization and due process must prevail against the makeweight reasoning employed to deny Petitioners' standing to litigate the program's racial bias.

It must not go unnoted, of course, that Petitioners did apply for the opportunity to compete for the contract award, and that they were denied the opportunity on the grounds, as the District Court has found, of race and color.

Reliance by the Fifth Circuit on *Moose Lodge No. 107 v. Irvis*, 1972, 407 U.S. 163, is misplaced. Petitioners' standing rests primarily on the fact they are indeed already members of the "club," *i.e.*, small business concerns which are members of the class intended to be benefited by the Small Business Act, under color of which the 8(a) program is operated. As members of this class they obviously have standing to litigate the legitimacy and Constitutionality of a program which intentionally excludes them from the Act's benefits on an invidiously discriminatory basis.

As has been shown, the Fifth Circuit in conceding standing to litigate the question of Congressional authorization, based its determination on the existence of "manifest" injury to the Petitioners. (App. at page 10(a)). This Court in *Moose*

Lodge No. 107, at page 177 stated: "Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." This language is misquoted in the Fifth Circuit's opinion, App. at page 29(a), quotation at line 5.

Petitioners' injuries are not self-inflicted, nor have they risen by chance in the market place. All of them flow directly and immediately from the fact that Petitioners are intentionally excluded on racial grounds from the 8(a) program. Added to this discriminatory exclusion is the culminating injury of commercial competition sharpened by premium prices paid to the favored firms for just such a use.

Moose Lodge No. 107 does not support the ruling of the Fifth Circuit; and it is submitted that the *Sierra Club* case, 1972, 405 U.S. 727, destroys it. There, this Court made it clear that once standing is made to appear by the inflicting of an injury in derogation of Constitutional or statutory right, the remedy open to the complaining party may reach to the full extent of the illegal action. In this respect this Court at page 740, footnote 15, wrote: "The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief." For application in contract cases of this "private attorney general" principle, see *Scanwell Laboratories, Inc. v. Shaffer*, 1970, D.C., 424 F.2d 859. See, also, for the latitude of the principle, *Trafficante v. Metropolitan Life Ins.*, 1972, 409 U.S. 205.

THE 8(a) PROGRAM IS UNAUTHORIZED

Before proceeding to argue the obvious, *i.e.*, the unconstitutionality of a Federal program in which race is the determinative criterion, it is appropriate to consider whether Congress has indeed, as the Fifth Circuit says, authorized SBA, under color of Section 8(a) of the Small Business Act, to make Federal procurement awards privately to "socially and economically disadvantaged" small business concerns.

If Congressional authorization for such awards is lacking, it obviates consideration of the fact that the criteria in fact cover invidious racial discrimination. The District Court found, in detail, that Congress never considered or authorized the 8(a) program, and Petitioners respectfully submit that its judgment is correct.

Certainly, Congress authorized SBA by means of Section 8(a) to undertake prime contracts with Federal agencies and to enter into subcontracts thereafter. But beyond this, the statute simply lacks the clarity claimed for it by the Fifth Circuit. It certainly does not by its terms provide that the subcontracts may be privately placed, or restricted to a sub-classification of small business concerns whose members are chosen on the wholly vague and subjective criteria that they are "socially or economically disadvantaged."

In the first place, the Small Business Act nowhere indicates that "social" disadvantage is one of its targets. Additionally, Congress clearly authorized SBA, in the Economic Opportunity Act of 1964, as amended in 1967, to organize a program of assistance for small business concerns owned by "low-income" individuals or located in "low-income" areas. (*Supra*, at page 5). It authorized SBA to define "low-income", and to "take such steps" to "place", to

which Petitioners give a geographical connotation, Federal contracts for the purposes of the program. Overall, Congress stipulated that the financial assistance must not "include the procurement of plant or equipment, or goods or services." Section 2949(2), *supra* at page 6.

The Fifth Circuit reads these provisions as evidencing Congressional support for a program based not on defined "low-income" but on disparate, less-objective criteria, and purportedly authorized by another statute. Left unanswered by the Fifth Circuit is the obvious question, why did SBA not select the Economic Opportunity Act as the basis for its program?

Petitioners respectfully submit that the answer is as obvious as the question. SBA has by-passed the Economic Opportunity Act, because a program under that Act would have been equally available, as intended by Congress, to all citizens, regardless of race or color, so long as they met the objective standards of defined income. In addition, Congress had made it clear that the financial assistance offered by SBA was not to include disruption of the general procurement policies of the Government.

Beyond the question involved in using Section 8(a) for "socio-economic" purposes, lies the further question, whether its language authorizes the private placement of Federal contracts?

The statute provides that SBA may arrange "for the performance of its prime contracts by negotiating or otherwise letting subcontracts to small business concerns or others. . . ." "Negotiation" under the applicable statutes and regulations governing military and civilian procurement, of course, mandates competition (10 USC 2304; 41 U.S.C. 252; Armed Services Procurement Regulations: 1-300.1,

1-300.3, 1-702(b), 3-102(c); General Services Administration Regulations: 41 C.F.R. 1-1.301-1, 1-1.301-3, 1-3.101-1, 1-1.702(b)(1).

Congress has through the years required that the Government's business be contracted for on a competitive basis. It has thus assured all businesses of a fair opportunity to share in Government contracts, and correspondingly, gained for the taxpayer the economic benefits of competition. At the same time it has avoided the favoritism, corruption and waste which inevitably attend the private placement of Government contracts.

The statutes and regulatory codes are replete with expressions of the public policy that the Government's business shall not be a private preserve for the favorites of those in power, and that the fullest and fairest competition practicable must prevail where public contracts are involved. It is sufficient, however, to refer to the most recent declaration by Congress. In enacting Public Law 91-129, effective 26 November 1969, *supra* at page 6, Congress again restated its policies of "utilizing competitive bidding to the maximum extent practicable."

Earlier in enacting the Small Business Act, Congress in stating its policy, declared (15 U.S.C. 631):

> (a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being

> cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts *or subcontracts* for property and services for the Government (including but not limited to contracts *or subcontracts* for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation [emphasis added].

This Court has had occasion to enforce the Congressional policy of requring competitive procurement, whether by formal advertising or negotiation. *Paul v. United States,* 1963, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292. See, also, *New York Mail & News. Transp. Co. v. United States,* 139 Ct. Cl. 751, 154 F.Supp. 271 (1957), cert. den. 355 U.S. 904; *Schoenbrod v. United States,* 187 Ct. Cl. 627, 410 F.2d 400 (1969)).

The Fifth Circuit, however, has ruled that SBA may dispense with competition in the 8(a) program because it is "impractical", but impractibility in procurement does not have the connotation the Court gives to it. The term covers such instances as a single source, or an emergency, or secrecy. It has no applicability to the 8(a) program,

where there is no doubt that there are more "disadvantaged" than there are contract awards to go around. It may serve the purpose of SBA to handpick privately a "disadvantaged" firm to be favored, but it is hardly fair to the scores of others similarly situated who are eager and able to compete for the opportunity, nor is it impractical to provide them with such an opportunity.

In those rare instances, such as all-out war production, where Congress has permitted competitive procedures to be omitted, it has made its intention clear in unequivocal terms. A most pertinent example exists in the manner in which Congress amended in 1951 the Defense Production Act of 1950, enacted during the Korean War, for it then inserted the prototype of Section 8(a) into the Act. In 1951 Congress, disturbed by the deteriorating status of small business concerns caused by the great emphasis placed upon urgent war production, amended the Defense Production Act by providing for a Small Defense Plants Administration, hereinafter referred to as "SDPA". SDPA was the wartime predecessor of a peacetime SBA. To SDPA Congress gave wide powers on an emergency basis, to terminate on 30 June 1952. (Defense Production Act Amendments of 1951, July 31, 1951, P.L. 96, C. 275, 65 Stat. 131, 144).

Section 110 of the statute added section 714 to the Defense Production Act of 1950, and "the sense of Congress that small business concerns be encouraged to make the greatest possible contribution toward achieving the objectives of this Act." It created SDPA to carry out this policy, and granted to it, "*without regard to any other provision of law except the regulations prescribed under Section 201 of the First War Powers Act, 1941, as amended*" (emphasis supplied), a large array of powers including the present 8(a) power, for the benefit of small business concerns as a class. (Section 714(b)(1)).

From the consistent past record of Congress' insistence upon competitive bidding, except in the presence of specifically authorized exceptions, it is quite clear that the power granted in the present statute to SBA to award subcontracts by "negotiating or otherwise" falls far short of SBA's claim that it may privately place subcontracts in its sole and unreviewable discretion.

Congress' use of the word "negotiation" in Section 8(a) does not, therefore, free SBA and the Department of the Air Force from their duty to seek the widest competition practicable. The words "or otherwise" must be read in context with the immediately preceding requirement for competition, in accordance with the commonsense rule of construction, *ejusdem generis.*

It is just not credible, having required SBA to secure competition through negotiation, that Congress in the next breath intended to authorize the agency to place subcontracts privately. The only reading which can reasonably be given to the words "by negotiating or otherwise" is one which requires the agency to offer the subcontract to interested small business firms through a practicable competitive procedure, which may employ negotiation, formal advertising or a combination of both.

The Small Business Act of 1953 (Title II of Act, July 30, 1953, c. 282, 67 Stat. 232) enacted the substantive provisions of present section 8(a), (section 207(c)(d), section 208). Removed from the power, however, was the provision that it could be used without regard to any other provision of law. In addition, the restricting language, "by negotiating or otherwise", was inserted in the provision dealing with the letting of subcontracts to small business concerns and others (section 207(d)).

In 1958 Congress considered and enacted amendments to the Small Business Act of 1953. The 1958 amendments placed SBA on a permanent, instead of temporary basis. The "prime contract" power was consolidated into section 8(a) as it exists today.

In reporting on this power, the Senate in Report No. 1714 (1958 U.S. Cong. News & Adm., pp. 3071, 3072, 3075) stated as follows:

PRIME CONTRACTS

> Although the Small Business Administration is empowered to enter into contracts with any department or agency of the United States Government to furnish supplies and services, and to arrange for the performance of such contracts through subcontracting to small business concerns or others, as may be necessary, this authority has not been used to date. As explained elsewhere in this report, the $100 million fund authorized for this program is being reduced to $25 million.
>
> * * *
>
> The authorization for prime contracts is reduced by $75 million because this authority has not been used, and there is no present intention to use it. The remaining authorization of $25 million should be sufficient until such time as it may be necessary to exercise this authority in considerable volume.

This Senate report to the Congress was based in turn upon the report made by the Small Business Administration in hearings before the House Banking and Currency Committee (May 14-22, 1957), pending consideration of the legislation which finally became the Small Business Act of 1958. In its report SBA represented at page 58:

V. Small Business Administration Prime Contract Program

> The Small Business Administration is empowered to enter into contracts with any department or agency of the United States Government to furnish supplies and services, and to arrange for the performance of such contracts through contracts to small business concerns or others, as may be necessary.
>
> *The Small Business Administration believes that its authority to take prime contracts in order to extend subcontracting should be continued on a standby basis, for use in emergencies* (emphasis supplied).

Contemporaneously with the passage of the 1958 amendments, SBA promulgated its first 8(a) regulations (*supra* at page 7). Effective 31 December 1958, its regulations repeated what it had represented to Congress as its reason for renewing the power, and what in turn it recognized the purpose of Congress to have been in entrusting the power to it on a permanent basis. The regulations, therefore, spoke unequivocally of a "standby" power to be used in emergencies, and in accordance with standard competitive procedures.

Reliance by the Fifth Circuit on *American Trucking Ass'n. v. Atchison, T. & S.F. Ry.*, 1967, 387 U.S. 397 (App. at pages 15(a), 22(a) and 23(a), is clearly misplaced, insofar as it is used as authority for supporting SBA's elaboration of the 8(a) power granted to it by Congress. It is hardly logical to equate SBA's position with that of a quasi-judicial agency called upon to regulate competing business interests as they ebb and flow over the years. When SBA

in 1970 elaborated on the grant of power, it was not responding to a regulatory need erroneously judged in the past.

The 8(a) power entrusted no duty of regulation upon SBA; it was empowered only to assume a contractual function in periods of emergency, and under competitive procedures. The power, as defined by SBA itself in 1958, had specific limitations; and it was not for SBA, but for Congress to determine whether the power should be used in other circumstances, and under other procedures.

Obviously, SBA feels that there is a need to aid the "disadvantaged;" but Congress has responded to the needs of the situation in other terms. It has authorized a program for "low-income" firms; and SBA cannot opt for a different program of aid.

Truly applicable is the case of *United States v. Amer. Trucking Assn's*, 1939, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345, which deals, in ascertaining the intent of Congress, with the weight to be given to the contemporaneous interpretation by the agency which has proposed enactment of the power and to whom exercise of the power is entrusted.

The District Court has found that, when in 1968 SBA instituted this program, it did not in fact do so under color of Section 8(a). (App. at page 70(a), Finding 25). The undisputed facts in the record support this finding totally. SBA carried on the program surreptitiously for approximately two years, before it surfaced the program in the regulation, amended effective 10 November 1970 (App. at page 90(a)).

It is clear that the program began without the asserted parentage of either the Small Business Act, the Economic Opportunity Act, or the Executive Orders now relied upon.

It was pure and simple, a bootlegged program without authority in law. Pressed by protests and pending litigation SBA in search of a birth certificate for the program, finally selected Section 8(a) as the putative parent.

About the Executive Orders relied upon to give legitimacy to the program, Nos. 11458, 11518, 11625 (App. at pages 93(a) - 102(a)), it may be said only that they state the policy of the Government to aid "minority" business enterprise, using only such powers as the involved agencies may already have. They do not purport to enlarge or even to interpret such powers; and most curiously, for what are purported to be adoptive documents, they make no reference to the 8(a) program.

Finally, E.O. No. 11518, Section 6, specifically provides: "The term 'small business concern' as used in this order shall have the same meaning as in the Small Business Act." Petitioners read this as meaning that there is to be no discrimination between themselves and others, on the basis of other than "small business" criteria.

CONSTITUTIONAL ISSUES

Petitioners do not think that it is necessary to belabor the point, that neither SBA or Congress may constitutionally exclude persons on the basis of race and color alone from the benefits of a Federal program. They believe that this would clearly violate the due process and equal protection requirements of the Fifth and Fourteenth Amendments. Cf. *Bolling v. Sharpe*, 1914, 347 U.S. 497.

Nor do they believe that, as part of such a program, the Federal Government may employ its crushing power intentionally to enhance the competitive standing of a favored business firm as against its competitors in the commercial market. Cf. *Frost v. Corporation Commission*, 1929, 378

U.S. 515. In other words, Petitioners do not believe that the Constitution permits the Federal Government such one-sided behavior as to create, finance, and assist a hand-picked favorite for the intended purpose of enhancing its competitive position against similarly situated small business concerns not receiving such aid. Such aid, having no regard for the destructive impact on the un-aided, cannot be fairly characterized as essentially remedial aid.

The gloss attempted by the Fifth Circuit that the injury to Petitioners is only incidental to a valid program, is unrealistic (App. at page 27(a)). The injuries are direct, palpable and intended. Not only are Petitioners excluded from the program on the basis of race and color, but they suffer the direct consequence of premium prices paid on Federal contracts to the favored firm for the specific purpose of enabling that firm better to compete in the commercial market, as witness the instance of Baillie's loss of valuable accounts.

It may well be that Petitioners and others similarly situated may have to endure mere financial assistance to "minority" firms, but it is too much to say that they must, also, endure Federal assistance in the form of moneys specially targeted for commercial penetration of their market.

Petitioners agree that there is no constitutional requirement that Federal contracts be competitively bid, and that they may be used to complement policies of the Government in fields other than procurement. But the Fifth Circuit, although it recognizes that "the government remains subject to the constitutional requirement of due process," completely fails to adhere to this caution (App. at page 27(a)). The Federal Government may legally restrict procurement opportunities to a specified class, as it does in

15 U.S.C. 644 with respect to "set-asides" reserved for small business concerns; but the class must be Constitutionally drawn. And it is not drawn within Constitutional limits, when among the beneficiary class, only those of a specified race and color are eligible.

Petitioners find it curious that the Fifth Circuit can equate "disadvantaged" with "minority" in one part of its rationale (App. at page 16(a)), and then proceed to serve its purpose by ignoring the equation when it discusses the requirement for due process in Federal procurement policy (App. at page 27(a)).

To the extent that Constitutional issues are present, they are due entirely to the actions of SBA in creating and operating a program on a racial basis. The program has never been considered or authorized by either Congress or the President. Congress has made its basic position crystal clear with respect to all of its socio-economic legislation. In 42 U.S.C. §2000(d) it has provided:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The cases cited by the Fifth Circuit in this respect have no relevance. In the first place, it can hardly be argued that "minorities" have been discriminated against by Federal procuring agencies. Secondly, insofar as the program has for its aim support for "minority" business, the means used for providing that support is unconstitutional, because it intentionally excludes from the program others who, except for their race and color, are similarly situated socially and economically with those favored. This case is distinguished

from those cited, in that color, race and origin are used not only to identify those in need of a program's benefits, but also for the purpose of excluding others, although these others are also statutory beneficiaries. In this respect, SBA makes invidious use of color and race.

CONCLUSION

The benefits granted to Petitioners and other similarly situated small business concerns by the Small Business Act with respect to Federal procurement, their exclusion from the 8(a) program, and the injuries suffered by them as a direct consequence of the program are all subject to judicial scrutiny and redress.

In *Gonzalez v. Freeman*, 334 F.2d 570, 575 (C.A.D.C. 1964), now Chief Justice Burger observed:

> Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts. An allegation of facts which reveal an absence of legal authority or basis fairness in the method of imposing debarment presents a justiciable controversy in our view. The injury to appellants alleged in their complaint gives them standing to challenge the debarment processes by which such injury was imposed. See *Cooper Plumbing & Heating*

Co., v. Campbell, 110 U.S. App. D.C. 177, 179-180, 290 F.2d 368, 370-371 (1961).

It is appropriate to respond to the Fifth Circuit's obvious dedication to socio-economic needs, with the following language by Judge Tamm, of the District of Columbia Circuit, in *Ballerina Pen Company v. Kunzig*, 433 F.2d 1204, 1208 (C.A.D.C. 1970):

> Frequently the motivation of challenged agency action is neither caitiff nor paltry, with the result that the purity of doctrine and the nobility of purpose tend to narcotize completely the searches for legal authorization. The unfortunate result is euphemistic in that the legal wolf is effectively disguised in an emotionally appealing wool. Courts are therefore confronted with the problem of insuring that the idealistic objectives of brave but congressionally unauthorized action, ostensibly undertaken pursuant to a "public interest" provision, are legally bottomed upon something more than a Bourbon Monarch's "L'Etat– c'est Moi."

It is respectfully submitted that the petition for *certiorari* should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1163

RAY BAILLIE TRASH HAULING, INC., ET AL,
Plaintiffs-Appellees,

versus

THOMAS S. KLEPPE, Administrator,
Small Business Administration, et al,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 5, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 18, 1973)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

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RAY BAILLIE TRASH HAULING, INC., ET AL,
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Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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(April 18, 1972)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge: On reconsideration sua sponte, we withdraw our opinion dated January 5, 1973 and issue the following opinion.

* * * *

In this case the plaintiffs attack the Small Business Administration's program for awarding government procurement contracts to small business concerns owned by "socially or economically disadvantaged persons." 13 C.F.R. § 124.8-1(c). The district court held that the section 8(a) program is not authorized by statute and denies due process and equal protection in violation of the Fifth and Fourteenth Amendments. We reverse.

I.

The plaintiffs-appellees, Ray Baillie Trash Hauling, Inc., Leonard Santo, d/b/a L & J Waste Service, and C. Lewis Jones, d/b/a Southern Florida Sanitation Company of Dade County, Inc., are engaged in the business of collecting and hauling refuse to disposal sites. They qualify as small business concerns under both the Small Business Act, 15 U.S.C. § 631 *et seq.*,[1]

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[1]Section 2 of the Small Business Act defines "small business concerns" as follows:

> For the purposes of this chapter, a small-business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. In addition to the foregoing criteria the Administrator, in making a detailed definition, may use these criteria, among others: Number of employees and dollar volume of business. Where the number of employees is used as one of the criteria in making such definition for any of the purposes of this chapter, the maximum number of employees which a small-business concern may have under the definition shall vary from industry to industry to the extent necessary to reflect different characteristics

and the applicable regulations of the Small Business Administration. All American Waste, Inc., named as a defendant, is a black-owned firm that competes with the plaintiffs in the business of collecting and hauling refuse and also qualifies as a small business concern. The dispute in the present case relates to a contract for the collection and removal of refuse from Homestead Air Force Base in Homestead, Florida. In 1968 and 1969, the Small Business Administration and the Department of the Air Force, pursuant to a joint program,[2] set aside the contracts for placement with small business concerns. The Air Force awarded the contracts after formal advertising and competitive bidding restricted to small business concerns. Jones and Santo successfully bid for the contract in 1968 and 1969 respectively.[3]

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of such industries and to take proper account of other relevant factors. Pub. L. 85-536, § 2[3], July 18, 1958, 72 Stat. 384.

15 U.S.C. § 632.

[2]Section 28(b)(11) of the Small Business Act authorizes the SBA to set aside contracts for placement with small business concerns. The SBA has the power:

> (11) to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share of materials, supplies, and equipment to small-business concerns;

15 U.S.C. § 637(b)(11).

[3]In 1968, Jones was the successful bidder and received a contract price of $42,245. In 1969, Santo was the successful bidder and received a contract price of $49,166.

In 1970, the Small Business Administration promulgated new regulations establishing a "section 8(a) program" providing for assistance to small business concerns owned by disadvantaged persons. 13 C.F.R. § 124.8-1. As part of the program, the SBA secured a prime contract from the Air Force for the collection and removal of refuse from the Homestead base for a two year period commencing July 1, 1970. The SBA then negotiated a similar subcontract with All American for the performance of the services in the prime contract between the SBA and the Air Force for a one year period commencing July 1, 1970 at $65,000.[4]

Upon being advised that the SBA intended to enter into a second subcontract with All American for the performance of the prime contract services at Homestead for the fiscal year 1971, the plaintiffs demanded an opportunity to compete for the contract. They did not apply for participation in the program and they did not contend that they were eligible. The SBA rejected the demand and later executed the second subcontract with All American. On June 29, 1971, the plaintiffs commenced the present action for injunctive and declaratory relief in the District Court for the Southern District of Florida. The defendants were the Administrator of the Small Business Administration, the Secretary of the Department of the Air Force, the Contracting Officer assigned to Homestead Air Force Base,

[4]The SBA contends that the contract price was arrived at by computing estimated cost plus allowance for a reasonable profit. The district court found that the contract price includes a premium designed to enhance All American's competitive position against the plaintiffs and other similarly situated small business concerns.

and All American Waste, Inc. In the complaint, the plaintiffs sought a permanent injunction enjoining the SBA from letting the Homestead contract under the section 8(a) program without competitive bidding. At the same time, they filed a motion for a temporary restraining order and a preliminary injunction.

With the consent of the parties, the district court issued an order directing that the second subcontract be held in abeyance for thirty days and that the prior contract with All American be extended until further order. Later orders of the court extended this period until judgment on the merits.

On October 29, 1971, the district court entered its judgment. 334 F. Supp. 194. The court found that the SBA's section 8(a) program, providing for assistance to small busines concerns owned by disadvantaged persons, was not authorized by the Small Business Act and violated the federal statutes requiring competitive bidding in government procurement. The court also found that the primary criterion for the program was race, color, and ethnic origin, that whites were ineligible for program benefits except on a token basis, and that the plaintiffs, as "non-minority" owned firms, were denied due process and equal protection of the laws. The court concluded that the subcontract awarded to All American was illegal and ordered that the Homestead contract be awarded as soon as possible on the basis of the maximum competitive bidding practicable among the plaintiffs and other similarly situated small business concerns. The defendants appealed.

II.

At the outset, we must confront two questions relating to our ability to hear and decide the merits of the parties' contentions: first, whether the present case is moot; and second, whether the plaintiffs have standing to litigate the issues raised in their complaint.

The question of mootness arises from the fact that All American did not satisfactorily perform its responsibilities under the contract. The Air Force terminated the contract with All American on October 1, 1971, and has since negotiated a refuse contract, under 10 U.S.C. § 2304(a)(2), with one of the plaintiffs for the duration of the fiscal year 1972. A case is not moot, however, if there is a reasonable expectation that the act complained of will be repeated. *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303. The Court has been advised that the SBA intends to continue its section 8(a) program, including future awards of the Homestead contract. We conclude, therefore, that a real controversy exists and that the appeal may proceed. *See also, American Bible Society v. Blount*, 3 Cir. 1971, 446 F.2d 588; *Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO*, 7 Cir. 1971, 447 F.2d 945.

The question of the plaintiffs' standing is considerably more difficult. In general, to have standing to litigate, a party must show that he has incurred, or is in immediate danger of incurring, some direct and personal injury resulting from the violation of a constitutional or statutory right designed to protect that party.

Moose Lodge No. 107 v. Irvis, 1972, U.S., S.Ct., 32 L.Ed. 2d 627; *Sierra Club v. Morton*, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636; *Laird v. Tatum*, 1972, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154; *Association of Data Processing Organizations, Inc. v. Camp*, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184; *Barlow v. Collins*, 1970, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192. To be sure, even a slight injury may suffice in some circumstances. *See Flast v. Cohen*, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947. Yet the fundamental principle remains inviolate: one who has no personal stake in the outcome of the controversy always lacks standing.

In the case at bar, the plaintiffs challenge the SBA's section 8(a) program on two separate grounds. First, the plaintiffs contend that the SBA lacked the statutory and constitutional authority to establish its section 8(a) program. Second, assuming there is authority for establishing the section 8(a) program, the plaintiffs contend that the SBA has administered the program in an unconstitutional manner by discriminating on the basis of race, color, or ethnic origin.

Turning to the first of these issues, we conclude the plaintiffs have standing to litigate the question of the statutory and constitutional authority for establishing the section 8(a) program. The plaintiffs allege not only that they have been injured by the SBA's action removing government procurement contracts from competitive bidding, but also that the section 8(a) program enabled All American to receive a premium price above that which would have prevailed under compet-

itive bidding and that All American has since used this premium to submit low bids for private commercial contracts thus causing the plaintiffs to lose some of their customers to All American. In these circumstances, the injury to the plaintiffs is manifest. Moreover, as small business concerns, the plaintiffs are arguably within the zone of interests intended to be protected by the Small Business Act. *See Association of Data Processing Organization, Inc. v. Camp, supra.* We therefore find that the plaintiffs have standing to litigate the first issue. For the present, we pretermit the question of the plaintiffs' standing to litigate the issue of the SBA's alleged discrimination in administering the section 8(a) program.

III.

As stated in the regulations promulgated by the SBA, the purpose of the section 8(a) program is "to assist small business concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place." 13 C.F.R. § 124.8-1 (b). [5] Authority for the program is de-

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[5] The regulations governing the section 8(a) program provides, in pertinent part:

§ 124.8-1

(a) *General.* Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and subcontract the performance of such contracts.

(b) *Purpose.* It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable busi-

rived from section 8(a) of the Small Business Act, 1 U.S.C. 637 (a),[6] empowering the SBA to enter into al

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nesses capable of competing effectively in the marketplace.

(c) *Eligibility.* To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

(d) *Procurement selection criteria.* Procurements will be selected which are determined suitable for performance by an SBA subcontractor. However, procurements will not be considered where:

(1) Public solicitation has been issued;

(2) There is a reasonable possibility of an award being made to disadvantaged contractors under normal competitive procedures, or

(3) Where small business concerns are dependent in whole or in significant part on recurring Government contracts.

[6]Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), provides

(a) It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary —

(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government

types of contracts (including contracts for supplies, services, construction, research, and development) with other departments and agencies of the federal government and to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns. In awarding subcontracts under the section 8(a) program, the SBA limits eligibility to small businesses "owned or destined to be owned by socially or economically disadvantaged persons." 13 C.F.R. § 124.8-1(c). As the regulations recognize, this "often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." *Id.*

The district court held that the SBA's section 8(a) program was statutorily unauthorized, that the SBA's powers under section 8(a) of the Small Business Act are limited to periods of emergency, and that the SBA was bound by other statutes requiring government procurement contracts to be awarded competitively. We disagree.

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procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and

(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

A. The declared policy of the Small Business Act is to "aid, counsel, assist, and protect ... the interests of small business concerns in order to preserve free competitive enterprise [and] to insure that a fair proportion of the total purchases and contracts or subcontracts for the property and services of the Government ... be placed with small businesses enterprises." The Act is premised on the idea that "the essence of the American economic system is free competition," "that the preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation," and that "[s]uch security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed." 15 U.S.C. § 631.

To accomplish this goal, Congress vested the Small Business Administration with broad powers and responsibility over the economic life of small business concerns. The SBA is authorized to make loans to small business concerns, to provide technical and managerial aids, and to assist small business concerns in obtaining government contracts. 15 U.S.C. §§ 636, 638, 644. Most importantly, in section 8(a) of the Act the SBA is authorized to enter into procurement contracts with other federal agencies and to arrange for the performance of those contracts by subcontracting with small business concerns. 15 U.S.C. § 637(a). This section unequivocally states that the SBA is empowered to let subcontracts to "small business concerns or others." 15 U.S.C. § 637(a)(2). In accordance with this statutory mandate, the SBA adopted its section 8(a) program through which government procurement con-

tracts are awarded to small business concerns owned by disadvantaged persons.

The plaintiff contends, however, that the section 8(a) program is unauthorized because it is not specifically mentioned in the statute. This argument is without merit. The complex and volatile nature of problems, including allocation of government procurement contracts, often causes Congress to cast its statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs.[7] In this manner, agency expertise may be fully employed in dealing with such problems. The agency may evaluate the competing alternatives and formulate the policy best suited to the attainment of the statutory goal. Furthermore, the agency is left free to respond to the demands of changing circumstances or conditions unanticipated by Congress. Indeed, an agency could easily be prevented from serving its intended purpose if burdened with specific statutory regulations and programs.

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[7] *See e.g.*, FTC v. Sperry & Hutchinson Co., 1972, U.S. ——, —— S.Ct. ——. 31 L.Ed.2d 170· Permian Basin Area Rate Cases. 1968, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312; United States v. Southwestern Cable Co., 1968, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001; American Trucking Ass'ns v. Atchinson, T. & S.F. Ry., 1967, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847; American Power & Light Co., 1946, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103; Tagg Bros. & Moorhead v. United States, 1930, 280 U.S. 420, 50 S. Ct. 220, 74 L.Ed. 524, FRC v. Nelson Bros. Bond & Mortgage Co., 1933, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166; FTC v. Gratz, 1930, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993; United States v. Shreveport Grain & Elevator Co., 1932, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; *See* K. Davis, Administrative Law Treatise, § 2.01-2.16.

So it is with the case at bar. Congress has declared that the actual and potential capacity of small business concerns must be developed and that a fair proportion of total purchases and contracts of the federal government must be placed with such firms. 15 U.S.C. § 631. It has given the SBA the statutory authority and necessary discretion in awarding subcontracts to accomplish that goal. The discretion as to which firms shall receive subcontracts and the decision as to what regulations shall govern procurement is left to the SBA. 15 U.S.C. § 637. It must select the programs that will insure the economic development of small business concerns and provide for their participation in government procurement contracts. The SBA has responded by adopting a program which reflects its judgment of priorities in light of current facts. It is not the duty of the courts to evaluate the arguments regarding allocation of government procurement contracts or to consider the wisdom of the present programs. *American Trucking Ass'ns v. Atchison, T. & S.F.Ry.*, 1967, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847.[8] Rather, our task is limited to determining wheth-

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[8]As the court noted in Kendler v. Wirtz, 3 Cir. 1968, 388 F.2d 381, 383,

> A mere difference of judgment between a person disadvantageously affected by agency action and the responsible head of an agency over the merits of particular administration action as a means of achieving a legislative objective, when Congress has assigned authority to make and act upon such determinations to the agency, is not judicially reviewable. . . . [T]he statutory standard is expressed in such general concepts that it requires and must contemplate the exercise of discretion in choice among various rational alternatives none of which can fully satisfy all demands of competing interests. . . . [When the] duty

er the SBA has abused its discretion or exceeded its statutory authority in adopting the section 8(a) program. There is ample indication that small business concerns owned by disadvantaged persons have traditionally received a disproportionally small number of government procurement contracts.[9] It is certainly

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to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. . . . When then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

The area of government contract awards has long been recognized as one in which special deference should be shown to the discretion of the administrative agency. Perkins v. Lukens Steel Co., 1940, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108. The agency, of course, may not act arbitrarily. Scanwell Laboratories v Shaffer, D.C. Cir. 1970, 424 F.2d 859; Gonzalez v. Freeman, D.C. Cir. 1964, 334 F.2d 570.

[9] The limited extent to which minority business enterprises participate in federal government procurement indicates that these firms have received a disproportionately small number of contract awards. According to the Report of the President's Advisory Council on Minority Business Enterprise, at 5 (1971) "current figures place minority-owned businesses variously between 55,000 and 165,000, from a total of more than 5.5 million, or between one and three percent of the total business community." In Fiscal Year 1971 federal government procurement contracts let to minority-owned businesses (blacks, Indians, Puerto Ricans, Mexican Americans, and others) totalled $143.8 million. The SBA's section 8(a) program accounted for $66 million of this amount. Dept. of Commerce, Progress of the Minority Business Enterprise Program, at 9 (1972). The federal government's procurement contracting during this same period exceeded $45 billion. Secretary of the Defense, Military Prime Contract Awards and Subcontract Payments or Commitments — July 1970 - June 1971, at 7-8 (1971); General Services Administration, Procurement By Civilian Executive Agencies, Period July 1, 1970 - June 30, 1971, (1971). Thus, minority-owned businesses participated in about one-third of one percent of the total dollar volume of federal gov-

reasonable, therefore, for the SBA to make a special effort to alleviate this imbalance. Section 8(a) of the Act provides the authority to do so.

Furthermore, the plaintiffs cannot complain because a specific type of small business concern is the primary beneficiary of the present program. It is well settled that an agency need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 1935, 294 U.S. 608, 610, 55 S.Ct. 570, 79 L.Ed. 1086, but may "reform one step at a time, addressing itself to the phase of the problem which seems most acute." *Williamson v. Lee Optical Co.*, 1955, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563. *See Katzenbach v. Morgan*, 1966, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828; *Roschen v. Ward*, 1929, 279 U.S. 337, 49 S.Ct. 336, 73 L.Ed. 722. Since the present program is a reasonable means of promoting the statutory goal, we find that the SBA has not abused its discretion or exceeded its statutory authority.

The SBA's program is also supported by congressional and presidential mandates issued after the passage of the Act.[10] The first of these mandates is con-

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ernment procurement during the Fiscal Year 1971. Although no figures were presented comparing contract awards to non-minority-owned small business firms with awards to minority-owned small business firms, it is apparent that in general minority-owned small business firms have received a disproportionately small share of federal government procurement contracts.

[10] We hold that the Small Business Act alone provides sufficient authority for the SBA's section 8(a) program. We discuss these additional authorities, however, because we find they show convincingly that the SBA has not abused its discretion or exceeded its statutory authority.

tained in the 1967 Amendment to the Economic Opportunity Act, 42 U.S.C. 2701 *et seq.* This amendment directs the SBA to "assist in the establishment, preservation, and strengthening of small business concerns ... with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals."[11] 42 U.S.C. 2901.

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[11]The plaintiffs argue that the 1967 Amendment defines eligibility in terms of low-income, not social and economic disadvantage. 42 U.S.C. § 2901. The plaintiffs would conclude that the Amendment cannot provide support for the SBA's program. This restrictive interpretation fails for three reasons. First, the broad goal of the Economic Opportunity Act and the 1967 Amendment clearly contemplates that the beneficiaries of the Act need not be defined exclusively in terms of income. The Act states that its purpose is to eliminate "the paradox of poverty in the midst of plenty" and that the nation can achieve its economic and social potential only if "every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of society." The Senate Committee on Labor and Public Welfare, in its Report on the 1967 Amendments to the Economic Opportunity Act, recognized that achievement of the statutory goal required that disadvantaged minorities be included in the programs established by the Act: "The Committee feels that an important priority of the anti-poverty effort must be to expand the opportunities for a stake in the community economic life for low-income persons *and minority group members*, especially in the urban getto." S. Rep. No. 563, 90th Cong., 1st Sess. 65 (1967). (emphasis added.)

Second, the House and Conference Reports of the 1967 Amendment state that the Administrator of the SBA has the responsibility for defining "low income", and that "such definition need not correspond with the definition of 'low income' as used elsewhere in the act." 1967 U.S. Cong. and Adm. News, p. 2485, 2596; H.R. Final Report No. 866, 90th Cong., 1st Sess. (1967); Conference Report No. 1012, 90th Cong., 1st Sess. (1967). When an administrative agency is charged with the responsibility for defining a broad statutory term, the agency's construction must be accepted if it has a reasonable basis in law. NLRB v. Hearst Publications, 1944, 322 U.S. 111,

In addition, the Administrator of the SBA is specifically instructed to "take such steps as may be necessary and appropriate, in coordination and cooperation with the heads of other Federal departments and agencies, *so that contracts, subcontracts, and deposits made by the Federal Government or in connection with programs aided with Federal funds are placed in such a way as to further the purposes of this subchapter.*" 42 U.S.C. 2906c(a). (emphasis added.)

In response, the plaintiffs contend that the Economic Opportunity Act prohibits the awarding of the subcontract in the present case since section 2949(2) provides that financial assistance may not include the procurement of plant or equipment, or goods or services. 42 U.S.C. 2949(2). This section, however, clearly applies to grants in kind and does not preclude awards of subcontracts for the performance of services. On the contrary, financial assistance through contract awards is expressly approved by the Act. 42 U.S.C. 2906(c)(a).

The presidential mandates for the SBA's section 8(a) program are found in Executive Orders 11458, 11518,

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64 S.Ct. 851, 88 L.Ed. 1170; Gray v. Powell, 1941, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301. The legislative history clearly indicates that factors other than income may be considered. Indeed, it is unlikely that many persons who own small businesses are impoverished in the strict sense. Even for the Act to have meaning, therefore, it is necessary to read the term "low-income individuals" in a broad manner. We conclude that the SBA's construction of the term has a reasonable basis in law.

Finally, the standards for determining eligibility under the SBA's section 8(a) program contemplate that income will be an important factor. 13 C.F.R. § 124.8-1. In these circumstances, we find plaintiffs' contention that the 1967 Amendment is inapplicable to be without merit.

11625[12]. In the first order, issued March 5, 1969, the President instructed the appropriate federal departments and agencies to establish programs to strengthen minority business enterprise. Exec. Order No. 11458, 34 Fed. Reg. 4937 (1969). In the second order, issued March 21, 1970, the President called for increased representation of the interests of small business concerns, particularly minority-owned business concerns, within federal departments and agencies. Exec. Order No. 11518, 35 Fed. Reg. 4939 (1970). In the third order, issued October 13, 1971, the President directed all federal departments and agencies to "continue all current efforts to foster and promote minority business enterprises." Exec. Order No. 11625, 36 Fed. Reg. 19967 (1971). In terms substantially identical to the SBA's section 8(a) program, the order defines "minority business enterprise" as "a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons." *Id.*

The SBA's section 8(a) program clearly promotes the goals articulated in both the 1967 Amendment to the Economic Opportunity Act and the executive orders. We conclude that there is ample support for the section 8(a) program.

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[12]The SBA's section 8(a) program was instituted in 1968. The plaintiffs argue that executive orders issued after that date cannot be considered in determining the authority for the program. We find this contention unsupported. The relevant period for the present case is the date when the second Homestead contract was awarded, 1971. Since the executive orders were issued before that date, they may be considered as authority. Furthermore, we note that executive orders have the force and effect of law. *See* Farkas v. Texas Investment Corp., 5 Cir. 1967, 375 F.2d 629, cert. denied 389 U.S. 977.

B. In reaching the conclusion that the SBA's powers under section 8(a) of the Small Business Act may be used only in periods of emergency, the district court relied on the fact that the statutory prototype of section 8(a), sections 714(b)(1)(B), (C), and 714(b)(2) of the Defense Production Act Amendments of 1951, was first enacted to increase the participation of small business concerns in the production of war material during the Korean War.[13] Defense Production Act Amend-

[13]The Defense Production Act Amendments of 1951 were designed to insure the participation of small business concerns in the production of material for the Korean War. The Amendments authorized the Small Defense Plants Administration (SDPA) to enter into contracts with other government agencies and to subcontract with small business concerns "without regard to any other provision of law except the regulations prescribed under Section 201 of the First War Powers Act, 1944, as amended." Act of July 31, 1951, ch. 275, § 110, 65 Stat. 140-41. Section 201 of the War Powers Act authorized contracting "without regard to the provisions of law relating to the making, performance, amendment or modification of contracts," whenever such action would facilitate the prosecution of the war. On February 2, 1951, President Truman issued Executive Order No. 10210, 16 Fed. Reg. 1049, authorizing certain federal agencies, including the Department of Defense, to exercise the subcontracting power granted by section 201. The order stated that "advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security need not be required."

In 1953, Congress established the Small Business Administration as the peacetime successor to the SDPA. The Small Business Act of 1953 conferred the subcontracting power upon the SBA but did not state, as did the earlier Amendments, that it could be exercised "without regard to any other provision of law." Act of July 30, 1953, ch. 282, 67 Stat. 235.

In 1958, Congress enacted the second Small Business Act. The Act provided that the SBA could use the subcontracting power "whenever it determines that such action is necessary" and that it could arrange for the performance of subcontracts "by negotiating or otherwise letting" 15 U.S.C. §637(a)(2).

ments of 1951, 65 Stat. 140, 141, §§ 714(b)(1)(B), (C), and 714(b)(2). In addition, the court noted that the regulations first promulgated by the SBA after the passage of section 8(a) stated that the authority to subcontract would be used only in periods of emergency. 13 C.F.R. § 124.8-1 (1958).[14]

We are not persuaded by this restrictive interpretation of section 8(a). There can be no more reliable

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[14]The 1958 regulations provided, in pertinent part:

13 C.F.R. § 124-8.1

> (a) During periods of emergency determined by the Administrator to warrant exercise by SBA of its prime contract authority, SBA will review procurement plans and programs of other Government departments and agencies to determine the contracts for property, equipment, supplies, or materials which SBA should undertake to furnish to the Government through the exercise of its prime contracting authority. Upon making such determination, SBA will make the certification provided for in section 8(a)(1) of the Small Business Act and will enter into a formal contract with the procuring agency. Thereafter, SBA will widely publicize its requirements and fully utilize its facilities listing in soliciting bids or proposals. Awards will then be made to the best qualified supplier, price and other factors considered.

The regulations promulgated by the SBA in 1970, of course, contain no such limitation. Congress has often criticized the SBA's initially restrictive interpretation of its powers. *See* note 15 *infra*. The SBA is certainly entitled to re-evaluate its position in these circumstances. As the Supreme Court noted in American Trucking Ass'n v. Atchison, T., & S.F.Ry., 1967, 387 U.S. 397, 416-417, 87 S.Ct. 1608, 18 L.Ed.2d 847,

> [W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. [citing cases]. In fact, . . . this kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency.

an indication of legislative intent than the specific statutory words selected by Congress in deliniating the powers conferred. Section 8(a) unambiguously provides that the SBA is empowered to act "whenever it determines that such action is necessary." 15 U.S.C. § 637(a). This broad mandate answers the argument that Congress intended to restrict section 8(a) to periods of emergency.[15]

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[15]Congress has stated on several occasions that section 8(a) can be used peacetime. In 1960, for example, the Final Report of the Select Committee on Small Business, referring to the SBA's initial position that section 8(a) could be used only in periods of emergency, stated:

> It is the conclusion of the committee that the [SBA's] interpretation of this Section is too narrow and limited; *that it was the intention of Congress that it would be used whenever necessary to assure that small business receives its fair share of Government procurement and not just in 'national emergency.'* The committee believes that small business is not getting its fair share, and that there could very well be instances wherein the assuming of prime contracts by SBA for the purpose of letting subcontracts to small businesses would be feasible.

H.R. Final Rep. No. 2235, 86th Cong., 2d Sess. 81 (1960) (emphasis added.) *See* Hearings before Subcomm. of the Comm. on Banking and Currency, 87th Cong., 1st Sess., at 262-264 (1961); Hearings on H.R. 4525 Before the Comm. on Banking and Currency, 84th Cong., 1st Sess., at 97 (1955).

The plaintiffs point out that the SBA, in a report presented to the House Committee considering the legislation which became the Small Business Act of 1958, stated that it believed its authority to subcontract was limited to periods of emergency. In American Trucking Ass'n v. Atchison, T., & S.F. Ry., *supra*, the Supreme Court commented on the reliability of such reports in determining legislative intent:

> We do not regard [an agency's report to Congress] as legislative history demonstrating a congressional construction of the meaning of the statute. . . . The advocacy of legislation by an administrative agency

We therefore conclude that the SBA's authority to use its powers under section 8(a) is not limited to periods of emergency.

C. As an additional ground for its decision, the district court held that section 8(a) prohibits the SBA's action awarding the Homestead contract to All American without formal advertising or competitive bidding. Again, we disagree.

Section 8(a) empowers the SBA to arrange for the performance of prime contracts by "negotiating or otherwise letting subcontracts." 15 U.S.C. 637(a)(2). The statute does not require the SBA to engage in competitive bidding. The plaintiffs contend, however, that to construe the phrase "or otherwise letting" as permitting the SBA to dispense with competition would be inconsistent with the congressional intent expressed in other statutes requiring competition in government procurement. These statutes recognize, however, that competition may be dispensed with when other statutes so provide, 41 U.S.C. 252(c)(15),[16] or when the purposes of the relevant program make it impractical to secure competition. 41 U.S.C. 252(c)(10). Both exceptions are applicable here.

— and even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable, guide to statutory construction. 387 U.S. at 417.

[16]The Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 252(c)15, provides that competition may be dispensed with where negotiation is "otherwise authorized by law." The regulations promulgated pursuant to the Act cite several examples, including "negotiation permitted by the Small Business Act." 41 C.F.R. § 18-3.217-3.

First, section 8(a) of the Small Business Act clearly constitutes specific statutory authority to dispense with competition. 15 U.S.C. 637(a). It provides that the SBA may let subcontracts by negotiation or any other method.

Second, competition is impractical in the present case. The purpose of the Act in to assist small business concerns. The Act is based on the premise that such firms are unable to compete effectively in the marketplace and therefore cannot secure government procurement contracts awarded through competitive bidding. By increasing their participation in government procurement, however, these firms can eventually become self-sufficient, viable businesses capable of competing effectively in the marketplace. Private negotiation of subcontracts is the best means of accomplishing this goal.[17] To require competitive bidding would be contrary to the basic rationale of the Act. Even if competition were limited to small business concerns, there would still be many small business concerns that would never receive government procurement contracts. This result would clearly frustrate the congressional intent to assist small businesses.

Kleen-Rite Janitorial Services, Inc. v. Laird, D.Mass. 1971, F.Supp., [September 21, 1971, No. 71-1968], supports the SBA's authority to institute the sec-

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[17]The 1967 Amendments to the Economic Opportunity recognized this fact by specifying that subcontracts were to be "*placed* in such a way as to further the purposes of this subchapter." 42 U.S.C. 2906c(a). Again, Congress avoided imposing any requirement of competitive bidding on the SBA in awarding subcontracts under the program.

tion 8(a) program. In *Kleen-Rite,* the plaintiff sought to enjoin the SBA and the Department of Defense from awarding a subcontract for janitorial services to a small business concern owned by socially and economically disadvantaged persons. In denying the injunction, the court held that the SBA had specific statutory authority to administer its section 8(a) program and that there was no statutory or constitutional duty to offer the subcontract for competitive bidding.

Space Services of Georgia, Inc. v. Laird, D.C.D. Conn. 1972, F.Supp., [No. 15,170; August 17, 1972] and *Fortec Constructors v. Kleppe,* D.D.C. 1972, F.Supp. [No. 1755-72; October 11, 1972], also uphold the legality of the section 8(a) program. The present case is on all fours with those cases.

We conclude, therefore, that subcontracts under the section 8(a) program may be awarded on a noncompetitive basis.

D. The plaintiffs also contend that in awarding the Homestead contract the SBA violated section 124.8-1(d)(3) of the applicable regulations, which provides that "procurements [under section 8(a)] will not be considered where ... (3) ... small business concerns are dependent in whole or in significant part on recurring Government contracts." 13 C.F.R. § 1248-1(d)(3). It is clear from the evidence presented to the district court, however, that the plaintiff who had previously been awarded the Homestead contract failed to perform the required services and abandoned the contract after nine and a half months. Thus, the SBA was

not depriving the plaintiffs of a renewal of an existing contract by placing the Homestead contract under the section 8(a) program.

E. Finally, the plaintiffs contend that the SBA's section 8(a) program, by using the government's lending and contracting powers to enhance All American's competitive position, violates due process. In effect, the plaintiffs argue that the section 8(a) program enabled All American to receive a premium price above that which would have prevailed under competitive bidding and that All American has since used this premium to submit low bids for private commercial contracts, causing the plaintiffs to lose some of their customers to All American.

It has long been recognized that the government, like private individuals and businesses, has the power "to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 1939, 310 U.S. 113, 127, 60 S.Ct. 869, 84 L.Ed. 1108. In exercising this power, of course, the government remains subject to the constitutional requirement of due process. But in the case at bar we cannot accept the plaintiffs' argument that the section 8(a) program is unconstitutional because the plaintiffs may be disadvantaged competitively. There is no constitutional duty to offer government procurement contracts for competitive bidding. The SBA has the statutory authority to assist small business concerns through private placement of contracts. We have already held that the SBA has not abused its discretion in adopting the section 8(a) pro-

gram. The program may produce some inequalities among small business concerns as a class. But in the area of socio-economic legislation, the government's action must be upheld if it is rationally related to a proper government purpose. *Dandridge v. Williams*, 1970, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491; *Walters v. St. Louis*, 1954, 347 U.S. 231, 74 S.Ct 505, 98 L.Ed. 660. We hold that it is.

IV.

We now consider the district court's decision that the SBA's section 8(a) program is unconstitutional because "the primary criterion for eligibility is race, color, or ethnic origin" and that the "[p]laintiffs have been excluded from consideration because of their race." As we have stated, to have standing to litigate, a party must show that he has incurred or is in immediate danger of incurring some direct and personal injury resulting from a statutory or constitutional right designed to protect that party. *Moose Lodge No. 107 v. Irvis, supra; Sierra Club v. Morton, supra; Laird v. Tatum, supra; Association of Data Processing Organization, Inc. v. Camp, supra.* In this case the plaintiffs have failed to meet that requirement with respect to the issue of the SBA's alleged discrimination in administering the section 8(a) program. The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially or economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.

Most directly in point is *Moose Lodge No. 107 v. Irvis, supra.* There, the Supreme Court held that the plaintiff did not have standing to litigate the question involving the membership qualifications of the Moose Lodge because he did not attempt to become a member; he did have standing to litigate the issues concerning the Lodge's guest policies because he was refused service while a guest. In discussing the standing requirement, the Court stated, 32 L.Ed. 2d at 634:

> Any injury to appellee from the conduct of Moose Lodge stemmed not from the Lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to others. [Citations omitted.] While this Court has held that in exceptional situations a concededly injured party may rely on the constitutional rights of a third party in obtaining relief, Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953), in this case appellee was not injured by Moose Lodge's membership policy since he never sought to become a member.

It follows from *Moose Lodge* that the plaintiffs in the present case have no standing to litigate the issue of racial discrimination in the administration of the section 8(a) program because they did not even apply for participation in the program.

In *Space Services of Georgia v. Laird, supra,* the district court dismissed a similar challenge to the

SBA's section 8(a) program on the ground that the plaintiff could "complain that there is discrimination in the administration of the program only if he had tried to become a member of the class eligible for the program." Again, in *Fortec Constructors v. Kleppe, supra,* the district court held that the plaintiff had no standing to raise the issue of racial discrimination because he had not applied for participation in the program. The court concluded that "[since] the plaintiffs have never sought to be eligible for the section 8(a) program, and never having had an 8(a) contract to gain, they cannot now allege that a contract was lost .... Solely on the basis of some generalized interest in the fair administration of a program, plaintiffs cannot attack the award as racially discriminatory."

In effect, the plaintiffs are asking this Court to resolve a question that is not now before us. We must decline the invitation. *See United States v. Raines,* 1960, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524. Otherwise, the grasp of our decree would exceed its proper reach. We therefore conclude that it was error for the district court to consider the issue of racial discrimination in the administration of the program.

The decision of the district court must be

REVERSED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

31(a)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1163

RAY BAILLIE TRASH HAULNG, INC., ET AL,
Plaintiffs-Appellees,

versus

THOMAS S. KLEPPE, Administrator,
Small Business Administration, et al,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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(January 5, 1973)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge: In this case the plaintiffs attack the Small Business Administration's program for awarding government procurement contracts to small business concerns owned by "socially or economically disadvantaged persons". 13 C.F.R. § 124.8-1(c). The district court held that the section 8(a) pro-

gram is not authorized by statute and violates the equal protection clause of the Fifth Amendment. We reverse.

I.

The plaintiffs-appellees in this case, Ray Baillie Trash Hauling, Inc., Leonard Santo, d/b/a L & J Waste Service, and C. Lewis Jones, d/b/a Southern Florida Sanitation Company of Dade County, Inc., are engaged in the business of collecting and hauling refuse to disposal sites. They qualify as small business concerns under both the Small Business Act, 15 U.S.C. § 631 *et seq.*, and the applicable regulations of the Small Business Administration. All American Waste, Inc., named as a defendant, competes with the plaintiffs in the business of collecting and hauling refuse and also qualifies as a small business concern. The dispute relates to a contract for the collection and removal of refuse from Homestead Air Force Base in Homestead, Florida. Before 1970, the contract services were formally advertised each year for competitive bidding by small business concerns under a program instituted by the Small Business Administration and the Department of the Air Force. Santo and Jones had successfully bid for the contract in 1968 and 1969 respectively.

In 1970, the Small Business Administration, under its section 8(a) program providing for assistance to small business concerns owned by disadvantaged persons, secured a new contract from the Air Force for the collection and removal of refuse from the Homestead base for a two year period commencing July 1, 1970. The SBA then negotiated a similar subcontract

with All American for the performance of the services in the prime contract between the SBA and the Air Force for a one year period commencing July 1, 1970, at $65,000.[1]

Upon being advised that the SBA intended to enter into a second contract with All American for the performance of the prime contract services at Homestead for the fiscal year 1971, the plaintiffs demanded an opportunity to compete for the subcontract. They did not contend that they were eligible under the SBA's section 8(a) program. After the SBA rejected the demand and executed the second subcontract with All American, the plaintiffs commenced the present action for injunctive and declaratory relief on June 29, 1971, in the District Court for the Southern District of Florida. The defendants were the Administrator of the Small Business Administration, the Secretary of the Department of the Air Force, the Contracting Officer assigned to Homestead Air Force Base, and All

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[1]The plaintiffs contend, and the district court found, that the contract price included a premium designed to enhance the competitive position of All American. The record fails to support this finding, however. As stated in the affidavit of John T. Scruggs, the Chief of Procurement and Maintenance Division for the SBA's Atlanta Regional Office,

> It is my information and belief and that of the Contracting Officer of Homestead that the contract price awarded to All-American ($65,000) in Fiscal Year 1971 was not excessive. According to my office records, the Air Force estimated that the contract would range from $63,000 to $67,000. The $40,116 figure which L & J Waste Service bid and was awarded was substantially lower because, in my opinion, L & J underbid the contract. This is supported by the fact that L & J was unable to meet the contract terms of the previously referenced contract.

American Waste, Inc. In the complaint, the plaintiffs sought a permanent injunction enjoining the SBA from letting the Homestead contract under the section 8(a) program without competitive bidding. At the same time, they filed a motion for a temporary restraining order and a preliminary injunction.

With the consent of all the parties, the district court issued an order directing that the second subcontract be held in abeyance for thirty days and that the prior contract with All American be extended until further order. Later orders of the court extended this period until judgment on the merits.

On October 29, 1971, the district court entered its judgment, declaring that:

> the subcontracts awarded by defendant Administrator to defendant All American are unauthorized by law and illegal, and that the Homestead services shall be contracted for as soon as possible on the basis of the maximum competitive bidding practicable among the plaintiffs and other similarly situated small business concerns.

The court concluded that the SBA's section 8(a) program violated the plaintiff's rights under the competitive bidding statutes and the Small Business Act and that the plaintiffs had been denied the right to equal protection of the laws under the Fifth Amendment.

II.

At the outset, we must decide whether the case is moot. The Court has been advised that All American did not satisfactorily perform its responsibilities under the subcontract and that the Air Force terminated the subcontract on October 1, 1971. The Air Force has since negotiated a refuse collection contract, under 10 U.S.C. 2304(a)(2), with one of the plaintiffs for the duration of fiscal year 1972.

A case is not moot if there is a reasonable expectation that the act complained of will be repeated. *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303. Since the SBA intends to continue its section 8(a) program, including future awards of the Homestead contract, we hold that a real controversy still exists and that the appeal may proceed. See also, *American Bible Society v. Blount*, 3 Cir. 1971, 446 F.2d 588; *Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union, AFL-CIO*, 7 Cir. 1971, 447 F.2d 945.

III.

As stated in the regulations promulgated by the SBA, the purpose of the section 8(a) program is "to assist small business concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place." 13 C.F.R. § 124.8-1(b).[2] Authority for the program is

[2]The regulations governing the section 8(a) program provides, in pertinent part:

derived from section 8(a) of the Small Business Act, 15 U.S.C. 637(a),[3] empowering the SBA to enter into

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§ 124.8-1

(a) *General.* Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and subcontract the performance of such contracts.

(b) *Purpose.* It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace.

(c) *Eligibility.* To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

(d) *Procurement selection criteria.* Procurements will be selected which are determined suitable for performance by an SBA subcontractor. However, procurements will not be considered where:

(1) Public solicitation has been issued;

(2) There is a reasonable possibility of an award being made to disadvantaged contractors under normal competitive procedures, or

(3) Where small business concerns are dependent in whole or in significant part on recurring Government contracts.

[3] Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), provides:

(a) It shall be the duty of the Administration and it is empowered, whenever it determines such action

all types of contracts (including contracts for supplies, services, construction, research, and development) with other departments and agencies of the federal government and to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns. In awarding subcontracts under the section 8(a) program, the SBA limits eligibility to small businesses "owned or destined to be owned by socially or economically disadvantaged persons." 13 C.F.R. § 124.8-1(c). As the regulations recognize, this "often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." *Id.*

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is necessary —

(1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and

(2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

The district court held that the SBA's section 8(a) program was statutorily unauthorized that, the SBA's powers under section 8(a) of the Small Business Act are limited to periods of emergency, and that the SBA was bound by other statutes requiring government procurement contracts to be awarded competitively. We disagree.

A. The declared policy of the Small Business Act is to "aid, counsel, assist, and protect ... the interests of small business concerns in order to preserve free competitive enterprise [and] to insure that a fair proportion of the total purchases and contracts or subcontracts for the property and services of the Government ... be placed with small businesses enterprises." The Act is premised on the idea that "the essence of the American economic system is free competition;" "that the preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation;" and that "[s]uch security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed." 15 U.S.C. § 631.

To accomplish this goal, Congress vested the Small Business Administration with broad powers and responsibility over the economic life of small business concerns. The SBA is authorized to make loans to small business concerns; to provide technical and managerial aids, and to assist small business concerns in obtaining government contracts. 15 U.S.C. §§ 636, 638, 644. Most importantly, in section 8(a) of the Act the SBA is authorized to enter into procurement contracts with other federal agencies and to arrange for the per-

formance of those contracts by subcontracting with small business concerns. 15 U.S.C. § 637(a). This section unequivocally states that the SBA is empowered to let subcontracts to "small business concerns or others." 15 U.S.C. § 637(a)(2). In accordance with this statutory mandate, the SBA adopted its section 8(a) program through which government procurement contracts are awarded to small business concerns owned by disadvantaged persons.

At the outset, we note that the width of the SBA statutory authority must be measured in part by the purposes for which it was conferred. Permian Basin Area Rate Cases, 1968, 390 U.S. 747, 776, 88 S.Ct. 1344, 20 L.Ed.2d 312. The Act confers broad responsibility on the SBA for the economic development of small business concerns. We therefore begin with the assumption that section 8(a) of the Act was intended to confer powers commensurate with that responsibility.

The plaintiff contends, however, that the section 8(a) program is unauthorized because it is not specifically mentioned in the statute. This argument is without merit. The complex and volatile nature of problems, including allocation of government procurement contracts, often causes Congress to cast its statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs.[4] In this manner, agency expertise may be fully

[4]*See, e.g.*, FTC v. Sperry & Hutchinson Co., 1972, _____ U.S. _____, _____ S.Ct. _____, 31 L.Ed.2d 170; Permian Basin Area Rate Cases, 1968, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312; United States v. Southwestern Cable Co., 1968,

employed in dealing with such problems. The agency may evaluate the competing alternatives and formulate the policy best suited to the attainment of the statutory goal. Furthermore, the agency is left free to respond to the demands of changing circumstances or conditions unanticipated by Congress. Indeed, an agency could easily be prevented from serving its intended purpose if burdened with specific statutory regulations and programs.

So it is with the case at bar. Congress has declared that the actual and potential capacity of small business concerns must be developed and that a fair proportion of total purchases and contracts of the federal government must be placed with such firms. 15 U.S.C. § 631. It has given the SBA the statutory authority and necessary discretion in awarding subcontracts to accomplish that goal. The discretion as to which firms shall receive subcontracts and the decision as to what regulations shall govern procurement is left to the SBA. 15 U.S.C. § 637. It must select the programs that will insure the economic development of small business concerns and provide for their participation in government procurement contracts. The SBA has responded by adopting a program which reflects its judgment

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392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001; American Trucking Ass'ns v. Atchinson, T. & S.F. Ry., 1967, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847; American Power & Light Co., 1946, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103; Tagg Bros. & Mocrhead v. United States, 1930, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524, FRC v. Nelson Bros. Bond & Mortgage Co., 1933, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166; FTC v. Gratz, 1930, 253 U.S. 421, 40 S.Ct. 527, 64 L.Ed. 993; United States v. Shreveport Grain & Elevator Co., 1932, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 125; *See* K. Davis, Administrative Law Treatise, § 2.01-2.16.

of priorities in light of current facts. It is not the duty of the courts to evaluate the arguments regarding allocation of government procurement contracts or to consider the wisdom of the present programs. *American Trucking Ass'ns v. Atchinson, T. & S.F.Ry.*, 1967, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847.[5] Rather, our task is limited to determining whether the SBA has abused its discretion or exceeded its statutory authority in adopting the section 8(a) program. The test is whether the program is rationally related to the attainment of the statutory goal.[6] Permian Basin Area Rate

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[5]As the court noted in Kendler v. Wirtz, 3 Cir. 1968, 388 F.2d 381, 383,

> A mere difference of judgment between a person disadvantageously affected by agency action and the responsible head of a agency over the merits of particular administration action as a means of achieving a legislative objective, when Congress has assigned authority to make and act upon such determinations to the agency, is not judicially reviewable. . . . [T]he statutory standard is expressed in such general concepts that it requires and must contemplate the exercise of discretion in choice among various rational alternatives none of which can fully satisfy all demands of competing interests. . . . [When the] duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. . . . We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

[6]The area of government contract awards has long been recognized as one in which special deference should be shown to the discretion of the administrative agency. Perkins v. Lukens Steel Co., 1940, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108. The agency, of course, may not act arbitrarily. Scanwell Laboratories v. Shaffer, D.C. Cir. 1970, 424 F.2d 46; Gonzalez v. Freeman, D.C. Cir. 1964, 334 F.2d 570.

Cases, supra; *United States v. Southwestern Cable Co.*, 1968, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001; *American Trucking Ass'ns v. Atchinson, T. & S.F.Ry., supra.*

The purpose of the section 8(a) program is to insure that small business concerns owned by disadvantaged persons participate in government procurement contracts. There is ample indication that such small business concerns have traditionally received a disproportionately small number of government procurement contracts.[7] It is certainly reasonable, therefore, for

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[7]The limited extent to which minority business enterprises participate in federal government procurement indicates that these firms have received a disproportionately small number of contract awards. According to the Report of the President's Advisory Council on Minority Business Enterprise, at 5 (1971) "current figures place minority-owned businesses variously between 55,000 and 165,000, from a total of more than 5.5 million, or between one and three percent of the total business community." In Fiscal Year 1971 federal government procurement contracts let to minority-owned businesses (blacks, Indians, Puerto Ricans, Mexican Americans, and others), totalled $143.8 million. The SBA's section 8(a) program accounted for $66 million of this amount. Dept. of Commerce, Progress of the Minority Business Enterprise Program, at 9 (1972). The federal government's procurement contracting during this same period exceeded $45 billion. Secretary of the Defense, Military Prime Contract Awards and Subcontract Payments or Commitments — July 1970 - June 1971, at 7-8 (1971); General Services Administration, Procurement By Civilian Executive Agencies, Period July 1, 1970 - June 30, 1971, (1971). Thus, minority-owned businesses participated in about one-third of one percent of the total dollar volume of federal government procurement during the Fiscal Year 1971. Although no figures were presented comparing contract awards to non-minority-owned small business firms with awards to minority-owned small business firms, it is apparent that in general minority-owned small business firms have received a disproportionately small share of federal government procurement contracts.

the SBA to make a special effort to alleviate this imbalance. Section 8(a) of the Act provides the authority to do so. "We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." Permian Basin Area Cases, *supra*, 390 U.S. at 780.

Furthermore, the plaintiffs cannot complain because a specific type of small business concern is the primary beneficiary of the present program. It is well settled that an agency need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 1935, 294 U.S. 608, 610, 55 S.Ct. 570, 79 L.Ed. 1086, but may "reform one step at a time, addressing itself to the phase of the problem which seems most accute. ..." *Williamson v. Lee Optical Co.*, 1955, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563. Since the present program is a reasonable means of promoting the statutory goal, we find that the SBA has not abused its discretion or exceeded its statutory authority.

The SBA's program is also supported by congressional and presidential mandates issued after the passage of the Act.[8] The first of these mandates is contained in the 1967 Amendment to the Economic Opportunity Act, 42 U.S.C. 2701 *et seq.*. This amendment directs the SBA to "assist in the establishment, preservation, and strengthening of small business concerns . . .

[8]We hold that the Small Business Act alone provides sufficient authority for the SBA's section 8(a) program. We discuss these additional authorities, however, because we find they show convincingly that the SBA has not abused its discretion or exceeded its statutory authority.

with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals."* 42 U.S.C. 2901. In addi-

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*The plaintiff argues that the 1967 Amendment defines eligibility in terms of low income, not social and economic disadvantage. 42 U.S.C. 2901. The plaintiff would conclude that the amendment cannot provide support for the SBA's program. This restrictive interpretation fails for three reasons. First, the purpose of the Economic Opportunity Act, and the 1967 Amendment, is to eliminate "the paradox of poverty in the midst of plenty". The premise of the Act is that the nation can achieve its economic and social potential only if "every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society." 42 U.S.C. 2701. In view of breadth of the statutory goal, the beneficiaries of the Act clearly need not be defined exclusively in terms of income. Second, the House and Conference Reports of the 1967 Amendment state that the Administrator of the SBA has the responsibility for defining "low income", and that "such definition *need not correspond with the definition of 'low income' as used elsewhere in the act.*" (emphasis added.) 1967 U. S. Code Cong. and Adm. News, p. 2485, 2596; H.R. Final Report No. 866. 90th Cong., 1st Sess. (1967); Conference Report No. 1012, 90th Cong., 1st Sess. (1967). The Act gives wide latitude to the SBA in defining the term "low income individual" and implies that factors other than income may be considered. Indeed, it is unlikely that many persons who own small businesses are impoverished in the strict sense. Even for the Act to make sense, therefore, it is necessary to read the term "low income individuals" in a broad manner. Furthermore, when an administrative agency is charged with the responsibility for defining a broad statutory term, the agency's construction must be accepted if it has a reasonable basis in law. NLRB v. Hearst Publications, 1944, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170; Gray v. Powell, 1941, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301. On the basis of an examination of the legislative history of the Act, we conclude that the SBA's construction of the term "low income" has a rational basis in law.

Finally, the standards for determining eligibility under the SBA's section 8(a) program contemplate that income will be an important factor. 13 C.F.R. § 124.8-1. In these circumstances, we find plaintiff's contention that the 1967 Amendment is inapplicable to be without merit.

tion, the Administrator of the SBA is specifically instructed to "take such steps as may be necessary and appropriate, in coordination and cooperation with the heads of other Federal departments and agencies, *so that contracts, subcontracts, and deposits made by the Federal Government or in connection with programs aided with Federal funds are placed in such a way as to further the purposes of this subchapter.*" 42 U.S.C. 2906c(a). (emphasis added.)

In response, the plaintiffs contend that the Economic Opportunity Act prohibits the awarding of the subcontract in the present case since section 2949(2) provides that financial assistance may not include the procurement of plant or equipment, or goods or services. 42 U.S.C. 2949(2). This section, however, clearly applies to grants in kind and does not preclude awards of subcontracts for the performance of services. On the contrary, financial assistance through contract awards is expressly approved by the Act. 42 U.S.C. 2906(c)(a).

The presidential mandates for the SBA's section 8(a) program are found in Executive Orders 11458, 11518, 11625.[10] In the first order, issued March 5, 1969, the President instructed the appropriate federal depart-

[10]The SBA's section 8(a) program was instituted in 1968. The appellees argue, therefore, that executive orders issued after that date cannot be considered in determining the authority for the program. We find this contention unsupported. The relevant period for the present case is the date when the second Homestead subcontract was awarded. Since the executive orders were issued before that date, they may be considered as authority for the Homestead contract award.

ments and agencies to establish programs to strengthen minority business enterprise. Exec. Order No. 11458, 34 Fed. Reg. 4937 (1969). In the second order, issued March 21, 1970, the President called for increased representation of the interests of small business concerns, particularly minority-owned business concerns, within federal departments and agencies. Exec. Order No. 11518, 35 Fed. Reg. 4939 (1970). In the third order, issued October 13, 1971, the President directed all federal departments and agencies to "continue all current efforts to foster and promote minority business enterprises." Exec. Order No. 11625, 36 Fed. Reg. 19967 (1971). In terms substantially identical to the SBA's section 8(a) program, the order defines "minority business enterprise" as "a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons." *Id.*

The SBA's section 8(a) program clearly promotes the goals articulated in both the 1967 Amendment to the Economic Opportunity Act and the executive orders. We conclude that there is ample support for the section 8(a) program.

B. In reaching the conclusion that the SBA's powers under section 8(a) of the Small Business Act may be used only in periods of emergency, the district court relied on the fact that the statutory prototype of section 8(a), sections 714 (b)(1)(B), (C), and 714(b)(2) of the Defense Production Act Amendments of 1951, was first enacted to increase the participation of small business concerns in the production of war material during the Korean War. Defense Production Act Amendments of 1951, 65 Stat. 140, 141, §§ 714(b)(1)

(B), (C), and 714 (b)(2). In addition, the court noted that the regulations first promulgated by the SBA after the passage of section 8(a) stated that the authority to subcontract would be used only in periods of emergency. 13 C.F.R. § 124.8-1 (1958).

We are not persuaded by this restrictive interpretation of section 8(a). First, there can be no more reliable an indication of legislative intent than the specific statutory words selected by Congress in deliniating the powers conferred. Section 8(a) unambiguously provides that the SBA is empowered to act "whenever it determines that such action is necessary." 15 U.S.C. § 637(a). This broad mandate answers the argument that Congress intended to restrict section 8(a) to periods of emergency.

The Senate Report on the 1958 amendments to the Small Business Act provides additional support for our interpretation. In discussing the SBA's authority to award contracts under section 8(a), the Report notes:

> Existing law directs the Small Business Administration to assist small business concerns in obtaining a fair proportion of Government contracts for property and services. Under existing law, such assistance may be made only when it is found to be in the interest of maintaining or mobilizing full productive capacity or in the interest of war or civil defense programs.
>
> The amendment puts the procurement assistance program on a peacetime basis, and

> permits assistance to be rendered for all types of Federal procurement *without regard to any relationship to the maintenance of full productive capacity or any relationship to war or civil defense programs.*

S. Rep. No. 1714, 85th Cong., 2d Sess. (1958). (emphasis added.) It is clear that, despite the wartime origin of the original Small Business Act, Congress did not intend to limit section 8(a) to emergency periods.[11]

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[11]Furthermore, Congress has stated on several occasions that section 8(a) can be used during peacetime. In 1960, for example, the Final Report of the Select Committee on Small Business, referring to the SBA's initial position that section 8(a) could be used only in periods of emergency, stated:

> It is the conclusion of the committee that the [SBA's] interpretation of this Section is too narrow and limited: *that it was the intention of Congress that it would be used whenever necessary to assure that small business receives its fair share of Government procurement and not just in 'national emergency.'* The committee believes that small business is not getting its fair share, and that there could very well be instances wherein the assuming of prime contracts by SBA for the purpose of letting subcontracts to small businesses would be feasible.

H. R. Final Rep. No. 2235, 86th Cong., 2d Sess. 81 (1960). (emphasis added.) *See* Hearings before Subcomm. of the Comm. on Banking and Currency, 87th Cong., 1st Sess., at 262-264 (1961); Hearings on H.R. 4525 Before the Comm. on Banking and Currency, 84th Cong., 1st Sess., at 97 (1955).

The plaintiffs point out that the SBA, in a report presented to the House Committee considering the legislation which became the Small Business Act of 1958, stated that it believed its authority to subcontract was limited to periods of emergency. Also, the plaintiffs note that the SBA's original regulations reflected a similarly narrow view of its authority under section 8(a). The plaintiffs contend that a restrictive interpretation of the SBA's authority is therefore justified. In response, we note that the words of the statute and the other auhorities previously discussed provide ample support for the contrary view. Furthermore, as the Supreme Court stated in American Truck-

We therefore conclude that the SBA's authority to use its powers under section 8(a) is not limited to periods of emergency.

C. As an additional ground for its decision, the district court held that section 8(a) prohibits the SBA's action awarding the Homestead contract to All American without formal advertising or competitive bidding. Again, we disagree.

Section 8(a) empowers the SBA to arrange for the performance of prime contracts by "negotiating or otherwise letting subcontracts." 15 U.S.C. 637(a)(2). The statute does not require the SBA to engage in competitive bidding. The plaintiffs contend, however, that to construe the phrase "or otherwise letting" as permitting the SBA to dispense with competition would be inconsistent with the congressional intent expressed in other statutes requiring competition in government procurement. These statutes recognize, however, that competition may be dispensed with when other statutes

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ing Ass'n v. Atchison, T., & S.F.Ry., 1967, 387 U.S. 397, 416-417, 87 S.Ct. 1608, 18 L.Ed.2d 847,

> [W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. [citing cases]. In fact, . . . this kind of flexibility and adaptability . . . is an essential part of the office of a regulatory agency.
>
> * * *
>
> We do not regard [an agency's report to Congress] as legislative history demonstrating a congressional construction of the meaning of the statute. . . . The advocacy of legislation by an administrative agency — and even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable, guide to statutory construction.

so provide, 41 U.S.C. 252(c)(15), or when the purposes of the relevant program make it impractical to secure competition. 41 U.S.C. 252(c)(10). Both exceptions are applicable here.

First, section 8(a) of the Small Business Act clearly constitutes specific statutory authority to dispense with competition. 15 U.S.C. 637(a). It provides that the SBA may let subcontracts by negotiation or any other method.

Second, competition is impractical in the present case. The purpose of the Act is to assist small business concerns. The Act is based on the premise that such firms are unable to compete effectively in the marketplace and therefore cannot secure government procurement contracts awarded through competitive bidding. By increasing their participation in government procurement, however, these firms can eventually become self-sufficient, viable businesses capable of competing effectively in the marketplace. Private negotiation of subcontracts is the best means of accomplishing this goal.[12] To require competitive bidding would be contrary to the basic rationale of the Act. Even if competition were limited to small business concerns, there would still be many small business concerns that would never receive government procurement contracts. This result would clearly frustrate the congressional intent to assist small businesses.

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[12]The 1967 Amendments to the Economic Opportunity recognized this fact by specifying that subcontracts were to be "placed in such a way as to further the purposes of this subchapter." 42 U.S.C. 2906(a). Again, Congress avoided imposing any requirement of competitive bidding on the SBA in awarding subcontracts under the program.

Kleen-Rite Janitorial Services, Inc. v. Laird, D.Mass. 1971, ___ F.Supp. ___, [September 21, 1971, No. 71-1968], supports the SBA's authority to institute the section 8(a) program. In *Kleen-Rite*, the plaintiff sought to enjoin the SBA and the Department of Defense from awarding a subcontract for janitorial services to a small business concern owned by socially and economically disadvantaged persons. In denying the injunction, the court held that the SBA had specific statutory authority to administer its section 8(a) program and that there was no statutory or constitutional duty to offer the subcontract for competitive bidding.

Space Services of Georgia, Inc. v. Laird, D.C.D. Conn. 1972, ___ F.Supp. ___, [August 17, 1972, No. 15,170], and *Fortec Constructors v. Kleppe*, D.D.C. 1972, ___ F.Supp. ___, [October 1, 1972], also uphold the legality of the section 8(a) program. The present case is on all fours with those cases.

We conclude, therefore, that subcontracts under the section 8(a) program may be awarded on a noncompetitive basis.

D. Finally, the plaintiffs contend that in awarding the Homestead contract the SBA violated section 124.8-1(d)(3) of the applicable regulations, which provides that "procurements [under section 8(a)] will not be considered where ... (3) ... small business concerns are dependent in whole or in significant part on recurring Government contracts." 13 C.F.R. § 124.8-1(d)(3). It is clear from the evidence presented to the district court, however, that the plaintiff who had pre-

viously been awarded the Homestead contract failed to perform the required services and abandoned the contract after nine and a half months. Thus, the SBA was not depriving the plaintiffs of a renewal of an existing contract by placing the Homestead contract under the section 8(a) program.

IV.

We now turn to a consideration of the district court's decision that the SBA's section 8(a) program is unconstitutional because "the primary criterion for eligibility under the 8(a) program is race, color, or ethnic origin" and that the "[p]laintiffs have been excluded from consideration for the Homestead awards because of their race."

At the outset, we note that the regulations promulgated by the SBA do not define eligibility in terms of race. On the contrary, the class eligible to receive assistance includes all small business concerns owned by socially or economically disadvantaged persons. As stated in the affidavit of the SBA's regional chief of procurement management, the determination whether an individual is socially or economically disadvantaged depends not "on a single factor, but rather on a composite of all the factors. ... [It is necessary to consider] financial statements to determine what the individual's accomplishments have been and where he is at present; and the general pattern of an individual life, his opportunities — educational, social and economic." No racial criterion is employed in making this decision. The regulations apply "equally to members of all races. Thus, a Caucasian may be found to be

socially or economically disadvantaged and thereby eligible for participation in the program." *Id.*

The district court held, however, that since most of the subcontracts under the program are awarded to nonwhites, the plaintiffs had established a prima facie case of racial discrimination. We find this conclusion unsupported. In some contexts, a racial distribution significantly disproportionate to the racial composition of the community at large may be sufficient to establish a prima facie case of discrimination. This principle is preeminently applicable to cases involving systematic exclusion of blacks from the jury system. *Hernandez v. Texas*, 1954, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866; *Coleman v. Alabama*, 1967, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed.2d 22; *Whitus v. Georgia*, 1967, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 544; *Patton v. Mississippi*, 1947, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76; *Norris v. Alabama*, 1935, 294 U.S. 587, 55 S.Ct. 345, 79 L.Ed. 655; *Neal v. Delaware*, 1881, 103 U.S. 370, ____ S.Ct. ____, ____ 26 L.Ed. 567; *Gibson v. Blair*, 5 Cir. 1972, ____ F.2d ____ [September 26, 1972, No. 72-1971]; *Labat v. Bennett*, 5 Cir. 1966, 365 F.2d 698, cert. denied 1966, 386 U.S. 991; *Davis v. Davis*, 5 Cir. 1966, 361 F.2d 770; *Scott v. Walker*, 5 Cir. 1966, 358 F.2d 561; *United States ex rel. Seals v. Wiman*, 5 Cir. 1962, 304 F.2d 53, cert. denied 1963, 372 U.S. 924. It is applicable in voter registration cases. *Alabama v. United States*, 5 Cir. 1962, 304 F.2d 583; *United States v. Ramsey*, 5 Cir. 1964, 331 F.2d 824. It is also applicable in other contexts. *Hawkins v. Town of Shaw*, 5 Cir. 1971, 437 F.2d 1286, *aff'd en banc*, 1972, 461 F.2d 1171; *United States v. Bd. of Educ.*, 5 Cir. 1968, 396 F.2d 44; *Gatreaux v. Chicago Housing Authority*, N.D. Ill. 1969, 296

F.Supp. 907; *Coppedge v. Franklin City Bd. of Educ.*, E.D. N.C. 1967, 273 F.Supp. 289, *aff'd*, 4 Cir. 1968, 394 F.2d 410. This is not the case, however, when economic and social programs of limited eligibility are involved. In such circumstances, the racial composition of the community at large is no longer the relevant factor. Rather, it is necessary to know the racial composition of the class of persons applying for benefits under the program. See *Cypress v. Newport News Gen'l & Nonsectarian Hosp. Ass'n*, 4 Cir. 1967, 375 F.2d 648; *Hawkins v. North Carolina Dental Soc'y*, 4 Cir. 1966, 355 F.2d 718; *Meredith v. Fair*, 5 Cir. 1962, 305 F.2d 343, cert. denied 1962, 371 U.S. 828; *Chambers v. Hendersonville City Board of Education*, 4 Cir. 1966, 364 F.2d 189. Extensive statistical data is not required.[13] At the minimum, however, the plaintiff must show a disparity between the racial composition of the class of persons receiving benefits under the program and the racial composition of the class of applicants. At that point, the burden shifts to the defendant, who must either refute the statistical showing or offer a constitutionally acceptable explanation for the disparity.

In the instant case, the plaintiffs have not met this initial evidentiary burden. The SBA has established racially-neutral criteria governing eligibility. It maintains that small business concerns owned by whites

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[13]As stated by one court, a prima facie case is made "where circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inference from established fact." Burghardt v. Detroit United R.R., 1910, 206 Mich. 545, 173 N.W. 360, 361. For a discussion of the elements of a prima facie case, see Fessler and Haar, Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 441 (1971).

are eligible for contract awards, and the record indicates that some whites have participated in the section 8(a) program.[14] There has been no showing that the number of contracts awarded to whites is significantly disproportionate to the number of white applicants. There is no indication that small business concerns owned by whites were excluded from consideration for the Homestead contract. Indeed, there has been no showing that a small business concern owned by socially or economically disadvantaged whites has ever been refused participation in the program. Furthermore, the plaintiffs do not even contend that they are socially or economically disadvantaged or that they qualified for assistance under the section 8(a) program.

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[14]As stated in the affidavit of John T. Scruggs, the regional chief of the procurement and management assistance division of the SBA's Atlanta regional office:

> [A] Caucasian may be found to be socially or economically disadvantaged and thereby eligible for participation in the program. Moreover, within my jurisdiction the Agency has awarded approximately 225 8(a) contracts. Of this number, 212 were awarded to Black Americans, eight to Spanish-Americans, two to American Indians, and three were awarded to Caucasians.

The affidavit of David C. Bell, chief of the procurement and management assistance division for the SBA's Boston regional Office, similarly states:

> I am further informed and believe that many of these firms [receiving section 8(a) contracts] are owned by Black Americans; others are owned by Caucasians; others owned by Mexican-Americans, American Indians, Oriental-Americans, and others of varied racial and ethnic backgrounds. The ownership of many of these firms was divided between persons of one, two or more of these various groups.

In these circumstances, we must conclude that the plaintiffs have failed to establish a prima facie case of racial discrimination.

We acknowledge that the SBA's section 8(a) program may produce some inequalities among small business concerns as a class. But in the area of socio-economic welfare legislation, the government's action must be sustained if it is rationally related to a proper government purpose. *Dandridge v. Williams*, 1970, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491; *Walters v. St. Louis*, 1954, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660. Assisting small business concerns owned by socially or economically disadvantaged persons certainly qualifies as a proper government purpose. As the court noted in *Kleen-Rite Janitorial Services, Inc. v. Laird, supra*,

> [The] class of persons eligible is not defined racially (whites, for example, being eligible) but by social or economic disadvantage. Social and economic classifications are common in welfare and other legislation, and have, so far as this court knows, not been regarded as unconstitutional on that ground. If the government is constitutionally free to select the handicapped for financial grants, it is surely free to select them for service contracts.

We conclude that the SBA's section 8(a) program does not violate the equal protection clause of the Fifth Amendment.

Finally, the plaintiffs contend that the section 8(a) program lacks objective criteria and consequently violates due process. As we have noted, however, the SBA relies on such factors as an individual's educational, social, and economic accomplishments and opportunities, as well as financial statements, in determining eligibility. Although agency officials are vested with wide discretion in administering the program, we think that the standard employed is reasonably precise in view of the difficulty of defining "socially or economically disadvantaged". Furthermore, there is no indication that the SBA has abused its discretion or acted arbitrarily in awarding contracts under the program.

Accordingly, the judgment of the district court is REVERSED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-1030-Civ-JLK

RAY BAILLIE TRASH HAULING, INC., *et al.*, *Plaintiffs*,	:	
v.	:	ORDER ON MANDATE
THOMAS S. KLEPPE, Administrator, Small Business Administration, *et al.*, *Defendants.*	:	

This action came on before the court upon issuance of the mandate of the Fifth Circuit Court of Appeals reversing this court's final judgment in the above-styled action. The court, having considered the mandate and being fully advised in the premises, it is hereby

ORDERED and ADJUDGED that the mandate of the Fifth Circuit Court of Appeals issued June 26, 1973, in the above-styled action pursuant to that Court's opinion and judgment dated April 18, 1973, be and the same is hereby made the order of this court.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Florida, this 18th day of July, 1973.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: AUSA Clemens Hagglund
Alexander Boskoff, Esq.
Bernard Jaffee, Esq.
Thomas S. Kleppe, SBA Administrator

Robert C. Seamans, Jr., Air Force Secretary
All American Waste, Inc.
Major Jack Ford, Contracting Officer, Homestead AFB
Ray Baillie Trash Hauling, Inc.
Leonard Santo, d/b/a L & J Waste Service
G. Lewis Jones, d/b/a South Florida Sanitation Co.

* * * * *

[Filed October 29, 1971]

JUDGMENT

Upon consideration of plaintiffs' verified complaint, the admission in open court on 29 June 1971 by the United States Attorney for the Southern District of Florida and counsel for the Small Business Administration that there is no issue of material fact respecting the allegations set forth in said verified complaint and that there are present only legal issues to be determined by the Court without further hearing, and upon consideration of the motion for summary judgment filed in behalf of plaintiffs, the motion to dismiss or, in the alternative, for summary judgment filed by the Assistant Attorney General of the United States in behalf of the defendants, the affidavits, exhibits and briefs filed by the respective parties, the Court hereby adjudges and decrees as follows:

FINDINGS OF FACT

1. Plaintiffs are independent firms engaged in the business of collecting and hauling refuse to disposal sites, and each is a "small business concern" as defined by applicable statute (15 U.S.C.A. §631 *et seq.*) and the regulations of the Small Business Administration, hereinafter referred to as "SBA".

2. The gross revenue of plaintiff Ray Baillie Trash Hauling, Inc., hereinafter referred to as "Baillie", for its most recent fiscal year was approximately $75,000; for plaintiff Leonard Santo, hereinafter referred to as "Santo", approximately $155,000; and for plaintiff G. Lewis Jones, hereinafter referred to as "Jones", approximately $125,000.

3. Defendant All American Waste, Inc., hereinafter referred to as "All American", is also engaged in the business of collecting and hauling refuse as a small business concern in competition with each of the plaintiffs, and its annual gross revenue approximates $100,000.

4. Defendant All American was formed and began operation in 1970 solely through financial aid and other assistance extended to it by defendant Thomas S. Kleppe, Administrator of the Small Business Administration, hereinafter referred to as "Administrator", and defendant Robert C. Seamans, Jr., Secretary of the Department of the Air Force, hereinafter referred to as "Secretary". As part of such aid and assistance, the Administrator and Secretary secured for SBA from Homestead Air Force Base, Homestead, Florida, hereinafter referred to as "Homestead", a contract for the collection and removal of refuse from the Base for the period 1 July 1970 through 30 June 1971 at a price of $65,000 and then without public notice of any kind privately subcontracted it to defendant All American at the same price for its sole benefit. Defendant All American has since been operating under the contract and receiving the contract price.

5. Prior to 1970 said contract services had been formally advertised each year by Homestead for competitive bidding restricted to small business concerns, including plaintiffs, as part of the statutory program instituted by SBA and

the Department of the Air Force in accordance with the declared policy of the Congress (15 U.S.C.A. §631):

> . . . that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

6. In 1969 plaintiff Santo was the successful bidder and received the contract at a price of $49,116.00. In 1968 plaintiff Jones was the successful bidder and received the contract at a price of $42,245.00. The $65,000 price awarded to defendant All American includes a premium designed to enhance its competitive position against plaintiffs and other similarly situated small business concerns.

7. The Homestead contract because of its size and annual occurrence represents a significant part of the business available to each plaintiff. In size, it represents 45% to 85% of the gross annual revenues of each plaintiff.

8. In 1970, subsequent to receiving the Homestead subcontract, defendant All American by offering lower prices caused plaintiff Baillie to lose several large accounts to defendant All American. At such time Baillie's monthly gross revenues amounted to approximately $6,000, and the loss of the aforesaid accounts deprived it of approximately

40% of its gross revenues. Defendant All American is presently competing against plaintiffs for their individual commercial accounts.

9. Upon learning that the Administrator and Secretary were planning to arrange for a second subcontract to All American at Homestead for fiscal year 1971 (1 July 1971 through 30 June 1972), plaintiffs demanded that each be given the opportunity to compete for such an award. This demand was rejected.

10. On learning that the defendant Administrator and Secretary had concluded their plan to benefit defendant All American by executing a written agreement with it for the fiscal year 1971-1972, despite assurances to plaintiffs that an agreement would not be entered into with said defendant pending resolution of plaintiffs' protest then before the Comptroller General of the United States, plaintiffs instituted this suit alleging that said agreement was illegal and that their rights under the United States Constitution had been violated. Thereafter, this Court entered on 1 July 1971 with the consent of the parties its order directing that performance of the subcontract executed with defendant All American on June 22, 1971 be held in abeyance for 30 days and that the prior contract with defendant All American could be extended by defendants until further order of the Court. The provisions of said order have been extended from time to time so that the order of the Court presently provides for a terminal date of October 25, 1971.

11. Defendants contend that they have been authorized by Congress to enter upon and carry out a program to aid "socially or economically disadvantaged persons" by the private placement with such individuals or firms as are selected by defendant Administrator of subcontracts for

goods, services, or other matters covered by prime contracts secured by defendant Administrator from the various departments and agencies of the United States Government. In direct support of such asserted authority defendants rely upon the language of 15 U.S.C.A. §637(a), Section 8(a) of the Small Business Act, Public Law 85-536, 72 Stat. 384, July 18, 1958, and implementing regulations adopted by the SBA effective November 10, 1970, Title 13 Code of Federal Regulations §124.8-1 *et seq.* Defendants refer to this program as the "8(a)" program and it will be referred to in such terms to refer to the statute and applicable regulations as well.

12. SBA's current 8(a) regulations (13 C.F.R. 124.8-1 *et seq.*) set forth the following criteria for determining who are "socially and economically disadvantaged persons" eligible for 8(a) program benefits:

> To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

13. In support of their Motion To Dismiss Or, In The Alternative, For Summary Judgment, defendants have filed

the affidavit of John T. Scruggs, Chief of the Procurement and Management Assistance Division of the Atlanta Regional Office of the SBA, sworn to on 6 August 1971. In his affidavit Mr. Scruggs has deposed as follows:

> 10. In determining whether one is socially or economically disadvantaged, reliance is not placed on a single factor but rather on a composite of all of the factors. In addition, the Regulations promulgated with respect to 8(a) contracts apply equally to members of all races. Thus, a Caucasian may be found to be socially or economically disadvantaged and thereby eligible for participation in this program. Moreover, within my jurisdiction the Agency has awarded approximately 225 8(a) contracts. Of this number, 212 were awarded to black Americans, eight to Spanish Americans, two to American Indians, and three were awarded to Caucasians.

14. In *Kleen-Rite Janitorial Services, Inc. v. Melvin Laird, Secretary of Defense, et al.* (United States District Court for the District of Massachusetts, Civil Action No. 71-1968-W), SBA caused to be filed in that suit the affidavit of David C. Buell, Chief of the Procurement and Management Assistance Division for its Boston Regional Office, sworn to on 20 September 1971. Mr. Buell deposed as follows:

> 8. In determining whether one is socially or economically disadvantaged, reliance is not placed on a single factor but rather on a composite of all of the factors. In addition, the Regulations promulgated with respect to 8(a) contracts apply equally to members of all races. Thus, a Caucasian may be found to be socially or economically disadvantaged and thereby eligible for participation in this program. Moreover, I am informed and believe the fact to be that since

the inception of the 8(a) program in 1968 through August 31, 1971, 795 small business firms have been awarded 1,153 8(a) contracts of a total value of $115,449,027. A statement showing the totals for each fiscal year is attached as Exhibit 1. I am further informed and believe that many of these firms are owned by black Americans; others are owned by Caucasians; others owned by Mexican-Americans, American Indians, Oriental-Americans, and others of varied racial and ethnic backgrounds. The ownership of many of these firms was divided between persons of one, two or more of these various groups.

The exhibit referred to sets forth the following tabulation:

FISCAL YEAR	NUMBER CONTRACTS AWARDED	VALUE	NUMBER OF COMPANIES
1968	8	$ 10,493,524	7
1969	30	8,884,141	23
1970	196	22,208,069	145
1971	811	66,120,409	523
1972 - 8/31/71	108	7,742,884	97
Totals	1,153	$115,449,027	795

15. The language of the 8(a) regulation and the depositions by Mr. Scruggs and Mr. Buell comprise all of the eivdence relating to criteria used by SBA in determining who is "socially or economically disadvantaged" and who from this class may receive the benefits of the 8(a) program.

16. The affidavit of Mr. Buell makes it clear that SBA, with the assistance of other departments and agencies of the United States Government, began the 8(a) program in 1968 and that 196 subcontracts had been privately placed under the 8(a) program as of 30 June 1970.

17. Prior to 10 November 1970, on which date the present 8(a) regulation became effective (Finding 11), the SBA regulation applicable to Section 8(a) of the Small Business Act provided in pertinent part as follows, effective 31 December 1968:

> §124.8-1 *Introduction.* (a) Section 8(a)(1) and (2) of the Small Business Act authorizes SBA to contract with any department or agency of the United States Government for the furnishing of articles, equipment, supplies or materials and to subcontract with small business concerns or others for the performance of such prime contracts.
>
> (b) This prime contracting authority has been placed on a standby basis and will be activated as required to protect the interests of small business.
>
> §124.8-2 *Procedures.* (a) During periods of emergency determined by the Administrator to warrant exercise by SBA of its prime contract authority, SBA will review procurement plans and programs of other Government departments and agencies to determine the contracts for property, equipment, supplies, or materials which SBA should undertake to furnish to the Government through the exercise of its prime contracting authority. Upon making such determination, SBA will make the certification provided for in Section 8(a)(1) of the Small Business Act

and will enter into a formal contract with the procuring agency. Thereafter, SBA will widely publicize its requirements and fully utilize its facilities listing in soliciting bids or proposals. Awards will then be made to the best qualified supplier, price and other factors considered.

(b) Standard Government procurement contracts, forms and procedures applicable to civilian agencies in effect at the time of such contracting will be utilized by SBA in making prime contracts or subcontracts.

18. This 8(a) regulation, hereinafter referred to as the "original" 8(a) regulation, to distinguish it from the version substituted as of 10 November 1970, hereinafter referred to as the "substitute" 8(a) regulation, was first adopted as of 31 December 1968 and remained in effect except for minor modification until the substitute 8(a) regulation was adopted as of 10 November 1970.

19. The original 8(a) regulation was promulgated contemporaneously with the passage by Congress of the Small Business Act, approved 18 July 1958, P.L. 85-536, 72 Stat. 384. Prior to the passage of this statute SBA reported to Congress, which was at the time considering amendments to the Small Business Act of 1953 (Title II of Act of 30 July 1953, 67 Stat. 232) which contained the substantive provisions of the present Section 8(a) in Sections 207(c)(d) and 208, that SBA "believes that its authority to take prime contracts [pursuant to these sections] in order to extend subcontracting should be continued on a standby basis, for use in emergencies."

20. SBA's then stated belief that the 8(a) power was intended by Congress to be reserved for emergencies is confirmed by the legislative history attending the creation

of the power by Congress. The power was initially entrusted to the Small Defense Plants Administration (SDPA) during the Korean War, to terminate on 30 June 1953, Defense Production Act Amendments of 1951, 31 July 1951, P.L. 96, 65 Stat. 131, 144. Concerned by the bypassing of small business in the Government's drive to achieve urgent war production, Congress stated that it was the "sense of Congress that small business concerns be encouraged to make the greatest possible contribution toward achieving the objectives of this Act." (Section 110, Defense Production Act Amendments of 1951, *supra*). Congress created SDPA to carry out its policy and gave to that agency the prototype of the power now reposed in SBA by means of Section 8(a). Defense Production Act Amendments of 1951, 65 Stat. 140, 141, §§714(b)(1)-(B), (C), and 714(b)(2).

21. The power granted to SDPA had its origin in legislation sponsored by Senator Sparkman and Representative Patman. These gentlemen were respectively chairmen of the Senate and House Committees overseeing the interests and welfare of small business. In speaking to the bill which would enact an 8(a) power, Representative Patman advised, in part, the House of Representatives as follows (Cong. Rec., Vol. 97, Part 1, pp. 410, 412):

> . . . This would enable the Small Defense Plants Corporation to act as a Government prime contractor and to sublet to small business concerns who would act as subcontractors to the Corporation. This very important provision was added to the Smaller War Plants Corporation Act after its original passage and proved to be extremely beneficial to small business. Actually, the Smaller War Plants Corporation took over very few contracts, but the power was there to do so if necessary and was,

> in effect, notice to the procuring agencies to award small business a fair proportion of the prime contracts. It is an effective provision by which the end result can be obtained, without its being used to any appreciable extent (Section 3).

22. The statute creating the power given to SDPA expressly provided that it could be exercised "without regard to any provision of law except the regulations prescribed under Section 201 of the First War Powers Act, 1941, as amended." President Truman, acting pursuant to Section 201 of the First War Powers Act, 1941, as amended, issued Executive Order No. 10210, February 2, 1951, 16 F.R. 1049, by which he authorized the Department of Defense [and thereafter other specified agencies] to exercise the extraordinary contract powers granted by Section 201. In said Executive Order he specifically provided:

> 5. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security need not be required.

23. Congress in reposing the 8(a) power in SBA restricted the power by removing from it the right to exercise it without regard to any other provision of law. In the circumstances, the original 8(a) regulation promulgated by SBA, effective 31 December 1958 (Finding 17), represented a contemporaneous and accurate expression of the intention of Congress that the 8(a) power in the Small Business Act (1958) was one to be exercised in the event of emergency for the benefit of small business as a class, and that when exercised subcontracts must be entered into on a publicized, competitive basis.

24. This contemporaneous interpretation justified the repeated explication by Congress that the Government's business shall be, unless specifically excepted, carried on by means of the maximum competitive bidding practicable, whether formal advertising or negotiation is used (10 U.S.C.A. 2304, 41 U.S.C.A. §252, and implementing regulations of the Department of Defense and the General Services Administration). Most recently Congress, in creating a Commission of Government Procurement, has stated its policy as follows (41 U.S.C.A. §251, November 26, 1969, P.L. 91-129, 83 Stat. 269):

> Section 1 [Declaration of policy]. It is hereby declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of goods, services and facilities by and for the executive branch of the Federal Government by—
>
> (1) establishing policies, procedures, and practices which will require the Government to acquire goods, services, and facilities of the requisite quality and within the time needed at the lowest reasonable cost, utilizing competitive bidding to the maximum extent practicable;

25. The fact that SBA instituted its subcontracting program for "socially or economically disadvantaged persons" in 1968 at a time when its original 8(a) regulation spoke clearly to other purposes and unequivocally required the maximum competition practicable among small business as a class, makes it appear that SBA did not then view the program as falling within the limits of the 8(a) power. Obviously, unless SBA is to be charged with wilful violation of its own regulations, it must be assumed to have acted upon some other asserted legal basis than the 8(a) power.

26. Congress has considered the plight of the poor and disadvantaged on numerous occasions. In the Economic Opportunity Act of 1964, as amended in 1967, 42 U.S.C.A. §2701 *et seq.*, it has made provision for assistance to such individuals. In sub-chapter IV of this Act it has empowered SBA to provide financial assistance by means of loans and grants to small business firms in areas with high proportions of unemployed or low-income individuals, or which are owned by low income individuals; but it has specifically stated that such financial assistance shall "not include the procurement of plant or equipment, or goods or services." 42 U.S.C.A. §2901, 2949(2).

27. Defendants have not offered any evidence that Congress has specifically approved, much less considered a private subcontracting program such as SBA with the active assistance of other Government departments and agencies is carrying on under color of the 8(a) statute. Defendants do not contend, nor have they offered any evidence that individual members of the so-called "minority" groups identified in substitute regulation 8(a) have been discriminated against in the formation and operation of small business concerns by reason of race, color or ethnic origin.

28. Plaintiff firms are owned and controlled by "whites". Defendant All American is a firm owned and controlled by a "black". It appears that SBA with the active assistance of other Government agencies is operating its 8(a) program in such a manner as to provide merely token eligibility for "whites", and that plaintiffs are effectively barred from sharing in the benefits of such a program by reason of race and color, although they are similarly situated with defendant All American as small business concerns.

29. Defendant Administrator and defendant Secretary are actively supporting and assisting defendant All American by means of their lending and contract powers for the purpose of enhancing its viability and competitive position as against plaintiffs and other similarly situated small business concerns, and the basis for so favoring defendant All American is the race or color of the individual owning or controlling it.

30. Defendants' actions have and are causing injury to plaintiffs' economic interests and have and are depriving plaintiffs of the benefits extended to them as small business concerns by Congress.

Conclusions of Law

1. Plaintiffs have legal standing and interest to bring this suit, and the Court has jurisdiction of the parties and subject matter involved in this suit.

2. Congress has by means of the Small Business Act provided important and valuable benefits for small business concerns as defined by defendant Administrator. These benefits include the right to compete for Government contracts on an equal basis with other small business concerns. The setting aside by defendant Administrator and defendant Secretary, prior to the events here involved, of the Homestead contract for competition among small business concerns and award to the successful bidder carried out the intent of Congress in this respect.

3. It is also the general policy of Congress that Government contracts, unless specifically excepted, shall be awarded by means of the maximum competitive bidding practicable, whether formal advertising or negotiation is used. This policy is made binding by applicable statute

upon the defendant Administrator and defendant Secretary in the making of contract awards. Section 8(a) of the Small Business Act does not create an exception to the statutes requiring the maximum competitive bidding practicable.

4. The private award of subcontracts to defendant All American by the defendant Administrator with the active assistance of the defendant Secretary constituted a violation of the statutory requirements obligating them to secure the maximum competitive bidding practicable, and arbitrarily and capriciously deprived plaintiffs of the benefits extended to them by Congress by means of the Small Business Act. The subcontracts are unauthorized by law and illegal.

5. Further, the legislative and regulatory history of the enactment and implementation of Section 8(a) of the Small Business Act demonstrates that Congress did not authorize by its provisions a program by defendant Administrator for the benefit of "socially or economically disadvantaged persons" as provided for and operated by defendant Administrator under color of Section 8(a). The substitute 8(a) regulation represents an attempt at legislation and usurps the power residing solely in Congress. The substitute regulation and the program carried on under color of its provisions are unauthorized and illegal.

6. The 8(a) program as carried on by defendant Administrator is also invalid and illegal in that it lacks objective criteria other than those of race, color or ethnic origin for the identification of those persons who are deemed to be "socially or economically disadvantaged" and otherwise eligible to receive contract awards from the defendant Administrator without competition. Plaintiffs are small business concerns similarly situated with defendant All American, but defendants in the operation of the 8(a) program ignore such a factor.

7. THe primary criterion for eligibility under the 8(a) program is race, color or ethnic origin. "Whites" are not eligible for the program benefits, except on a token basis. Plaintiffs have been excluded from consideration for the Homestead awards because of their race and color. There is no evidence that members of the "minority" groups identified in substitute regulation 8(a) have been discriminated against in the formation and operation of small business concerns by reason of race, color or ethnic origin. The exclusion of "whites", and specifically plaintiffs, from participation in the 8(a) program, except on a token basis, represents invidious discrimination against them. In this respect plaintiffs' rights under the competitive bidding statutes and the Small Business Act have been violated by the actions of the defendants, as have their right to receive equal protection of the laws pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States.

8. Defendant Administrator's and defendant Secretary's use of Government lending and contracting powers to favor defendant All American by enhancing its competitive advantage against plaintiffs in the private commercial field violates plaintiffs' rights under the Fifth Amendment to the Constitution of the United States in that it serves to deprive them of their property without due process of law.

Judgment

It is hereby ordered, adjudged and decreed this day of October, 1971, that plaintiffs have judgment in their favor, that the subcontracts awarded by defendant Administrator to defendant All American are unauthorized by law and illegal, and that the Homestead services shall be contracted for as soon as possible on the basis of the maximum competitive bidding practicable among plaintiffs and other similarly situated small business concerns.

The Court's order of 8 October, 1971, is hereby dissolved.

Jurisdiction is retained for such further relief as may appear just and equitable in the premises.

/s/ JAMES LAWRENCE KING
James Lawrence King
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1163

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* * * * *

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Plaintiffs-appellees petition the Court pursuant to Rule 40, F.R.A.P., for a rehearing of this appeal, and upon such rehearing for an order vacating this Court's decision filed 5 January 1973 and entering judgment affirming the judgment and final order of the District Court; or, in the alternative, for an order remanding the case to the District Court with instructions to take testimony on the operation and effect of the disputed program.

Plaintiffs-appellees pursuant to Rule 35, F.R.A.P., suggest the appropriateness of a rehearing *en banc*, on the ground that a question of exceptional importance is involved.

This appeal involves the legality of the "8(a) program", first instituted by the Small Business Administration in 1968 and presently being carried on by that agency with steadily increasing scope. Small Business Act, 15 U.S.C.A. 637(a). In brief, under the program SBA privately selects a "minority" member, or an already established business firm owned or controlled by a "minority" member, and in behalf of such individual or firm SBA secures from a Federal agency a prime contract at a premium price for the performance of services or the manufacture of a product. SBA then subcontracts the contract to the selected individual or firm at the prime contract price.

During fiscal year 1972 (30 June) SBA privately selected and placed in this manner 1706 "8(a)" subcontracts, having a dollar volume of more than 151 million dollars. *Progress Report, The Minority Business Enterprise Program (October 1972), Department of Commerce, Office of Minority Business Enterprise,* pp. 16-17.

All of these private awards were withdrawn from the small business sector of the economy, and several thousand "white" firms were thus deprived of any participation in a significant volume of business, in violation of the benefits created for them by Congress in the Small Business Act, 15 U.S.C.A. 631, *et seq.* As the Progress Report makes clear, SBA continues to enlarge the program, and consequentially to increase by thousands more the number of "white" firms adversely affected.

Beyond this, the 8(a) awards deal primarily with unsophisticated services, such as refuse hauling and building maintenance, or products which may be easily manufactured. Not surprisingly, many firms already exist to provide these services and products. They are in the main marginal small business firms which continue to exist only if they can survive the fiercest of economic pressures, and as such are the most in need of competitive opportunities granted to them by the Small Business Act and other statutes.

The present "white" plaintiffs-appellees illustrate the kind of small business firms that suffer the heavy impact of the "8(a) program". One has gross revenues from refuse hauling of approximately $75,000 annually, another $125,000, and the third $155,000. It is no wonder that they rebel against the action of SBA, in concert with the Department of the Air Force, which deprives them of the opportunity to compete for a refuse removal contract, previously reserved exclusively for competitive bidding

among small business concerns in general, particularly when the award to the "minority" firm, together with the commercial accounts secured by the firm in competition with plaintiffs, provides it with annual gross revenues of approximately $100,000.

It is respectfully submitted, therefore, that the disputed program, in that it endangers the existence of thousands of "white" small business concerns throughout the country, presents a question of exceptional importance which warrants consideration by this Court *en banc*. Ironically, because SBA operates the program on a completely private, non-competitive basis, some already established "minority" firms also find themselves thus deprived of meaningful business opportunities. See Appellees' Brief, quoting from report made by the *President's Advisory Council on Minority Business Enterprise*, at page 61, paragraph 2.

The District Court found that the "8(a)" program has not been authorized by Congress, that it plainly aborts the benefits created for small business concerns by Congress in the Small Business Act, 15 U.S.C.A. 631 *et seq.*, and other statutes, and that as operated it violates plaintiffs' constitutional rights to due process and equal protection. In view of the rationale of this Court's opinion reversing the judgment below, it is a matter of importance to know that the Government in the District Court admitted the factual allegations in the complaint, filed no answer, and induced the trial judge to decide the litigation on argument and briefs, and without the benefit of testimonial hearings (Judgment, R. 220). In this manner, the Government as it has in every case in which the legality of the "8(a)" program has been disputed, successfully avoided the presentation of evidence on the operation and impact of the program.

It is respectfully submitted, therefore, that it is most improper for this Court in its opinion to depart from factual findings by the District Court which rest directly upon the Government's concession. For example, plaintiffs alleged that "defendants Administrator [SBA] and Secretary [Air Force] have arranged for defendant All American ["minority" firm] to receive premium prices above the price which would have prevailed under competitive bidding, that they intend by this to create for defendant All American a competitive advantage against plaintiffs and other small business concerns similarly situated, not only with respect to the Homestead contract, but also with respect to commercial services for which defendant All American and plaintiffs are competitors" (Complaint, paragraph 18, R. 7).

This Court relying on an ambiguous and argumentative affidavit submitted by the Government with a subsequent motion for summary judgment, overruled the finding of the District Court, based upon the Government's representation that it accepted the facts alleged in the complaint, that the "minority" firm was receiving a premium price.

The fact is that SBA pays "minority" firms premium prices to enhance their competitive position. The fact is that SBA maintains a special fund for the purpose of reimbursing those Federal agencies which protest the excess in price demanded by SBA. In *Progress Report, The Minority Business Enterprise Program, 1972,* the Office of Minority Business Enterprise, Department of Commerce, at pages 16-18, states the facts so openly, that there can be no doubt of the error in overruling the District Court's finding:

> In fiscal years 1969 and 1970, most federal purchases from minority businesses were "channelled" on a non-competitive basis through the

> Small Business Administration, which subcontracted with a qualified minority business and *made up the difference between the minority firm's price and the price at which the agency originating the purchase could have obtained the goods elsewhere.* This type of procurement–popularly known as the "8(a) program"–accounted for 70 percent of federal purchases from minority businesses in fiscal year 1969, and 73 percent in fiscal year 1970; only 30 percent was made outside 8(a) channels. In fiscal year 1971, the tide began to turn as 54 percent of federal purchases were made directly from minority businesses on a competitive basis. In fiscal year 1972, this trend was confirmed; over 61 percent of federal purchases from minority businesses were made in response to independent marketing efforts rather than through SBA intermediation. Both forms of procurement continue to increase as new minority businesses are created, operate with SBA help for a time, and then move into the competitive mainstream. (Emphasis added)

The Government induced the District Court to forego testimony, by assuring the Court that it accepted the facts alleged in the complaint. This Court may not fairly brush aside this concession, to pick from a later *ex parte* affidavit, disputed by plaintiffs, asserted justification for a contrary finding of fact.

If this Court is not content to rest with the factual situation affirmed by the Government in open court below, it must remand to the District Court with instructions to hold an evidentiary hearing. It may not substitute its own finding for that of the District Court, because there is no

valid basis in the record for such a substituted finding. The general rule in this Circuit is as stated in *Kwong v. Occidental Life Insurance Company of Cal.*, 273 F.2d 691, 695 (1959):

> . . . Our duty is to test the record whether it contains substantial credible evidence of such character as to support the court's findings of fact. In other words, it is our duty to accept the findings of fact made by the court below, unless they are clearly erroneous.

If SBA is not only withdrawing vitally needed contracts from the small business community, but, also, placing them privately with "minority" firms at premium prices for the purpose of enhancing their competitive commercial position against the excluded small business firms, plaintiffs-appellees and other similarly situated small business concerns are indeed being deprived of due process and equal protection. This program goes far beyond remedial efforts for "minorities"; it is a program which is heedless of its destructive impact on others.

The erroneous treatment accorded by this Court to the finding with respect to premium prices also finds expression in other conclusions reached by this Court in its opinion. In all candor it must be said that a reading of the opinion leaves one with a feeling of *deja vu*—with the legal postures of "blacks" and "whites" now reversed in a struggle for equal opportunity and treatment. Now it is the "white" small business which is encountering that judicial glaucoma which serves to screen out the fact of obvious invidious discrimination. A fact obvious in the market place somehow becomes a legal enigma in the courthouse. As blacks were once faced with overwhelming burdens of proof with respect to their allegations of illegal discrimination in schools, in the jury box and in other matters, now it is

the "white" small business firm which is faced with unrealistic "evidentiary burdens".

The opinion of this Court states that "plaintiffs have not met this initial evidentiary burden"; *i.e.*, of proving that the "8(a) program" is a racially based program from which "whites" are excluded except on a token basis (at page 24). It accepts, however, the premises that the initial burden is satisfied "where circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inference from established fact" (at page 24, fn. 13).

Plaintiffs-appellees believe that the President's Advisory Council on Minority Business Enterprise is eminently qualified to establish the nature of the "8(a) program". The excerpts from the Council's report to the President (22 Februrary 1971) which are quoted in plaintiffs-appellees' Brief at pages 60-62 leave no doubt that the "8(a) program" is being operated for the exclusive benefit of "minority" business enterprises. The opinion of the Court does not refer to this report, but it is part of the record upon which the District Court based its findings and conclusions. Again, reference must be made to the Government's representation to the District Court that there was no dispute on the facts and that judgment could properly be entered on argument and briefs, without the need for testimonial hearings.

This Court is, also, respectfully referred to the Progress Report, *supra* at page 3, as patent evidence of the use of the "8(a) program" as a "minority" enterprise procedure. Because the Report was released publicly as recently as 10 January 1973, plaintiffs-appellees are filing 6 copies with the Clerk of the Court for convenient reference. .

Plaintiffs-appellees respectfully submit that this Court is looking through the wrong-end of the telescope, when it views the awarding of two out of 225 8(a) subcontracts in the Atlanta region as evidence that "whites" are not discriminated against in the program (at page 25, fn. 14). Correctly viewed, one must read these statistics as exhibiting obvious "tokenism" in reverse.

It is just too late in the day for either "minorities" or "whites" to have their constitutional rights diminished by unrealistic burdens with respect to proving the obvious. The burden should not be placed upon plaintiffs-appellees. SBA has all of the statistics locked up in its files. To the best of the plaintiffs-appellees' belief "whites" throughout the country are being intentionally held to less than 1% of the 8(a) awards made. Plaintiffs-appellees argued this to the District Court, and repeated the assertion in its brief in this Court. It advised this Court that SBA "is in a position to give the lie" to plaintiffs-appellees, if the figures were wrong (at page 60). Neither in the District Court or in this Court has SBA responded to the challenge.

"White" small business firms throughout the country are as entitled as "minorities" to receive the benefits of the obvious. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Supreme Court displayed no difficulty in reading procedures, neutral on their face, in the light of widely disparate results, and in striking down the procedures as discriminatory against "blacks".

This Court, to the contrary, has ignored the impact of the only statistics available to it in the record, and has used instead admittedly unsubstantiated hypotheses, such as that set forth at page 12, footnote 7.

The facts are, as an evidentiary hearing will reveal, that SBA is operating the "8(a) program" as a private pork barrel, secretly selecting "minority" members as the objects of its largesse, and securing for them contract awards at inflated prices. It has no standards, unless one would dignify unrestricted personal choice to that extent. It is heavily laced with policitcal considerations, and its asserted neutrality is a sham. As has been said, even "minority" members suffer discrimination. Hundreds have qualified as eligibles for the program, and are left standing at the altar, intentionally kept uninformed of the awards which SBA is developing with a specific favorite in mind. Truly, within the framework of Government, the program is an abomination.

It has never been authorized by Congress, and only an unwarranted shuffling of the Congressional record can make it appear otherwise. Congress spoke directly to the problem of assisting "in the establishment, preservation and strengthening of small business concerns . . . (1) located in urban or rural areas with high proportions of unemployed or low-income individuals, or (2) owned by low-income individuals. . . ." Economic Opportunity Act of 1964, as amended (1967), 42 U.S.C.A. 2901. SBA was authorized to "define the meaning of low-income as it applies to owners of small business [eligible] concerns . . ." and to extend financial assistance to them; but financial assistance could not include contracts for "the procurement of plant or equipment, or goods or services." *Id.* §§2906, 2949(2).

A year later, SBA covertly began its now-called "8(a) program" under color of the Small Business Act. It, thus, freed itself *ultra vires* of the restrictions Congress had imposed upon it in the Economic Opportunity Act and set out to operate a program for the benefit of privately selected "minority" members. In doing so it made use of

a power which it had secured from Congress in 1958 only after it had represented to Congress that the power would be reserved for emergencies and used under competitive conditions, and it carried on the program initially in direct contravention of its own regulations providing for emergency and competitive use (Brief, at pp. 44-46).

This Court in its reading of the Congressional record goes so far as to rely upon a Senate Report (No. 1714), which the Government in its Reply Brief (at page 6, fn. 3) concedes was "erroneously stated [as] explicitly concerned with SBA's prime contracting authority under Section 8(a)". Opinion at pages 17-18.

Plaintiffs-appellees have raised grave constitutional issues concerning themselves and thousands of other small business concerns. If this Court believes that the invidious discrimination practiced against them is now not clear from the record, they are entitled in all justice to have the matter remanded to the District Court for a full evidentiary hearing. And the District Court, too, in all fairness is entitled to a first opportunity to make its findings and conclusions upon such an expanded hearing on the authorization, operation and effect of the "8(a) program".

WHEREFORE, it is respectfully prayed that this petition be granted.

Respectfully submitted,

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Minority Enterprise—Mired or Moving

A Panel Discussion*

MR. ROBERT H. FINCH: Right now we are once again engaged in the beginnings of our quadrennial electoral exercise. I think in the middle of the rhetoric about the campaign even we, as lawyers, tend to forget one of the most remarkable things about these United States. Virtually unique among all the nations of the world, we are moving into the second century of our history with our original government and our basic institutions largely intact—modified, to be sure, but basically intact, even with the assaults of the 1960s. Unlike any other civilized nation, this country has never known a purge, never experienced a coup, nor have we lived under a junta.

One of the reasons for the almost incredible stability of our political institutions is that unique ambivalence but basic loyalty we Americans have acquired as we have lived and grown under American jurisprudence. As the American nation developed and evolved, it started with the base line inheritance of the Common law, expanded in the dramatic extension of moving order with the frontier, and absorbed some of the French and Spanish legal doctrines. In the process we achieved first stability then security and, finally, a reasonably well-knit society.

But now we've reached another watershed. We've reached a new stage of development where the fruits of our prosperity and the richness of our culture must be extended to every American and must be shared by all of us.

Structurally, inherent inequalities had been present from the beginning, as they are in all nations. But, the exciting and all-consuming task of carving a nation out of a continent, took all of our time and attention until very recently and we didn't really bother or care about whether the action was being shared.

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* Panelists were: Robert H. Finch, Counsellor to the President, Washington, D.C.; Charles M. Noone, Moderator, Member of the District of Columbia and Virginia Bars, Washington, D.C.; David M. Madway, Director, Economic Development Section, University of California, Berkeley, California; Darwin W. Bolden, National Director, International Council on Business Opportunities, New York, New York; Anthony G. Chase, Deputy Administrator, Small Business Administration, Washington, D.C.

Editor's Note—These remarks were presented in a program of this Section in San Francisco, California, on August 13, 1972.

* * * *

It wasn't until the 1950s when we had survived and come out of the Second World War as the strongest nation of the world that we began to look inward. The inequities which had been unfortunate in a growing, unfinished nation suddenly became intolerable for a nation whose moral conscience was as fully developed as its industrial capacity.

This is not to say that social progress was easy, or always peaceful.

AUDIENCE PARTICIPANT: What other agencies are you talking about when you say "other agencies"?

DARWIN BOLDEN: You know, SBA serves as the prime contractor. The contracts aren't automatically granted directly to a minority entrepreneur on his application.

I think Tony can lay it out to you a lot more in detail, but the Department of Defense has not been the most cooperative in this whole effort.

ANTHONY CHASE: The Federal government buys about $45 billion a year in goods and services. That includes defense spending. The bulk of that is defense and goods purchases. The rest is almost insignificant when compared with those.

Now, we did last year a total of minority aid on contracts—which Mr. Bolden referred to—of a little over $150 million. That doesn't sound like very much in relation to the $40-plus billion. However, if you compare it with 1967, or 1968 when this program first started, when they did $6 million, it's pretty good. We went from $67 million to $152 million, and next year a minimum will probably be $175 million.

So, I'm not going to get into a contest with anybody about whether this is too high or too low, but it's a lot better than it was in the past, and the natural reluctance of some agencies is because they are contract oriented. They want to buy at the cheapest possible price, and when we come along with our Section 8(a) program, we say, "How about paying 30 cents more than you paid last year on your hams or your radio antennas?" or whatever it is we want this minority entrepreneur to manufacture. You naturally meet a bit of resistance. It's just a problem of setting it out. The Defense Department, I think, has done very well.

DARWIN BOLDEN: If I may, Tony, that's not wholly true. The Defense Department, wouldn't you say—

ANTHONY CHASE: The bulk of it is—

DARWIN BOLDEN: Wouldn't it be fair to say that you're not talking about a difference of four to five, or 10 to 20 cents between a minority firm and a majority firm? Very often you find minority firms that are just as competent, just as competitive, in terms of price, with the same reasonable assurance of delivery.

ANTHONY CHASE: Then, they wouldn't need the 8(a) program. They'd get the bid, anyway.

DARWIN BOLDEN: I beg your pardon. Most of it goes to majority businessmen. I think it's fair to say that probably not more than—I don't know what the figures are—10 to 15 percent of all those who received aid on contracts are White. They're not Black. Minorities constitute less than 10 to 15 percent of all the aid recipients.

ANTHONY CHASE: That's not true. Almost a hundred percent of recipients of aid on contracts are minority enterprises. There are a few Appalachians and others that are White that we consider disadvantaged for this purpose.

The $152 million is virtually all minority contracting, and almost always costs the Government more.

DARWIN BOLDEN: I'd like to see your statistics on that, Mr. Chase.

I don't mean to challenge them, but I know that the 8(a) program has just begun to be used since your Administration came in; that is, used for minorities, but it has been in the books and used for some time.

ANTHONY CHASE: It wasn't used—

DARWIN BOLDEN: Yes, it was, for many years preceding the Administration. As a matter of fact, in 1967 and 1968 it was used for corporations, almost all White corporations, dealing in hard-core unemployment. Right in the Los Angeles area there are examples such as Aero Jet General.

ANTHONY CHASE: The $152 million is all, with the exception of a very few firms—two or three firms—minority. There are virtually no majority firms in that $152 million.

One other statistic that's important. It costs us eight to ten percent more. This is a hard, plain fact, that the Federal government pays a premium to use the 8(a) approach as opposed to the competitive-bid approach.

Obviously, the Government is going to pay less for it than if they negotiated with somebody.

MODERATOR NOONE: Let's move on.

DAVID MADWAY: Isn't it correct that litigation is pending in various Federal District Courts challenging the Section 8(a) program on contracts on the grounds that it violates equal protection?

ANTHONY CHASE: Yes. There are two. The basis of the 8(a) program is that instead of a contract being put out on a competitive bid, it is a program where SBA becomes a prime contractor and then, turns around and subcontracts on a negotiated basis to a minority firm, and that's a controversial aspect of the program. We're, obviously, favoring a minority firm

over the bidding process, and that alienates an awful lot of people, and especially that individual who had the contract for years and doesn't get it all of a sudden because it's going to a minority firm.

Four or five lawsuits have been filed. We won one; we lost one. The two that we either won or lost are on appeal. We're giving equal protection in favor of Blacks—that's their argument.

We're not worried about losing the case because we have a precedent in the Philadelphia Plan cases, which are much more extreme cases of what they call reverse racism.

There's another allegation that we violated our own regulations.

But while the program is up in the air in that sense, we are not too worried about it.

MODERATOR NOONE: Yes, sir.

AUDIENCE PARTICIPANT: My name is Walter Taylor and I'm a bit disappointed in this gathering of attorneys dwelling on a very small number of special programs.

Title 13—BUSINESS CREDIT AND ASSISTANCE

Chapter I—Small Business Administration

[Amdt. 4]

PART 124—PROCUREMENT AND TECHNICAL ASSISTANCE

Introduction and Procedures

Part 124 of Chapter I of Title 13 of the Code of Federal Regulations is hereby amended by:

1. Revising § 124.8–1 to read as follows:

§ 124.8–1 Introduction.

(a) *General.* Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and subcontract the performance of such contracts.

(b) *Purpose.* It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace.

(c) *Eligibility.* To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

35 F.R. 17833

(d) *Procurement selection criteria.* Procurements will be selected which are determined suitable for performance by an SBA subcontractor. However, procurements will not be considered where:

(1) Public solicitation has been issued;

(2) There is a reasonable possibility of an award being made to disadvantaged contractors under normal competitive procedures, or

(3) Where small business concerns are dependent in whole or in significant part on recurring Government contracts.

2. Revising § 124.8–2 to read as follows:

§ 124.8–2 Procedures.

(a) Concerns may submit applications for consideration under this program to SBA regional or district offices. Applications will include complete information regarding the concern's qualifications and capabilities to perform a contract.

(b) SBA will review procurement programs of other Government departments and agencies and identify proposed procurements suitable for performance by potential subcontractors.

(c) SBA will determine if a potential subcontractor is competent to perform a specific contract and will conduct appropriate negotiations with the other agency or department for the proposed procurement contract. Upon the request of the other agency or department, SBA will certify that the Administration is competent to perform the contract. Upon agreement as to terms, including price, SBA and the agency will enter into a prime contract using forms and provisions prescribed by statute and regulations applicable to the other Government agency. Thereafter, SBA will enter into appropriate subcontracts with the subcontractors for the performance of the prime contract.

(d) SBA may provide technical and management assistance to assist in the performance of the subcontracts.

Effective date. This amendment shall become effective upon publication in the FEDERAL REGISTER.

Dated: November 10, 1970.

HILARY SANDOVAL, Jr.,
Administrator.

[F.R. Doc. 70-15625; Filed, Nov. 19, 1970; 8:47 a.m.]

PART 124

SBA RULES AND REGULATIONS

[Amdt. 5]

PART 124—PROCUREMENT AND TECHNICAL ASSISTANCE

Contracting

Notice of proposed amendments to part 124 of chapter I of title 13 of the Code of Federal Regulations was published in the FEDERAL REGISTER on March 29, 1973, at 38 CFR part 8178. The Small Business Administration has carefully considered the comments submitted on this proposal and decided to adopt the regulations substantially as proposed. The only changes are minor and technical in nature.

Accordingly, part 124 of chapter I of title 13 of the Code of Federal Regulations is amended by revising §§ 124.8–1 and 124.8–2 to read as follows:

§ 124.8–1 The 8(A) Program.

(a) *General.*—These regulations implement section 8(a) of the Small Business Act (15 U.S.C. 637(a)) which authorizes SBA to enter into all types of contracts (including, but not limited to, supply, services, construction, research and development) with other Government departments and agencies and negotiate subcontracts for the performance thereof.

(b) *Purpose.*—It is the policy of SBA to use such authority to assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the market place.

(c) *Eligibility.*—(1) *Social or economic disadvantage.*—An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black American, American Indians, Spanish-American, oriental Americans, Eskimos, and Aleut. Vietnam-era service in the Armed Force may be a contributing factor in establishing social or economic disadvantage.

(2) *Ownership and control.*—Disadvantaged persons must presently own and control the concern except where a divestiture agreement or management contract, approved by the Associate Administrator for Procurement and Management Assistance, temporarily vests ownership or control in non-disadvantaged persons.

(i) *Proprietorships.*—An applicant concern may be a proprietorship.

(ii) *Partnerships.*—The ownership of at least a 50-percent interest in the partnership by disadvantaged persons will create a rebuttable presumption of ownership and control.

(iii) *Corporations.*—The ownership of at least 51 percent of each class of voting stock by disadvantaged persons will create a rebuttable presumption of ownership and control.

(iv) *Divestiture agreements.*—If an applicant concern is not presently owned and/or controlled by disadvantaged persons, the persons exercising such ownership and/or control must execute a divestiture agreement which will provide for ownership and control vesting in disadvantaged persons in accordance with the foregoing prescribed criteria within a reasonable period of time. All divestiture agreements must be approved by the Associate Administrator for Procurement and Management Assistance.

(v) *Management contracts.*—All management contracts entered into by section 8(a) concerns must be approved by the Associate Administrator for Procurement and Management Assistance.

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Effective Date: May 25, 1973
Cite: 38 F.R. 13729

§ 124.8–2 Procedures.

(a) *Submission of business plans.*—Applicants must submit a business plan, including complete information regarding the concern's qualifications, which will demonstrate that section 8(a) assistance will foster its participation in the economy as a self-sustaining, profit-oriented small business. In no event may the acceptance or approval of a business plan by SBA be construed as a commitment by SBA to award a single contract, a continuing series of contracts or provide any other assistance, contractual or otherwise.

(b) *Selection of potential contracts.*—SBA will, in consultation and cooperation with other Government departments and agencies, select proposed procurements suitable for performance by section 8(a) concerns. In making these selections, among the factors given consideration will be the percentage of all similar contracts awarded under the section 8(a) program over a relevant period of time, issuance of prior public solicitation of the procurement under a small business set-aside, the probability that an eligible concern could obtain a competitive award of the contract, and the extent to which other small concerns have historically been dependent upon the contract in question for a significant percentage of their sales.

(c) *Non-disadvantaged participants in a contract.*—To insure that the purposes of the section 8(a) program are being accomplished, applicants will disclose the extent to which non-disadvantaged persons or firms will participate in the performance of proposed section 8(a) contracts. Section 8(a) contractors may not subcontract any portion of a section 8(a) contract without the written consent of the SBA contracting officer. Joint venture agreements must be approved by the SBA Regional Director.

(d) *Negotiation of section 8(a) subcontracts.*—Section 8(a) subcontracts shall be negotiated with approved section 8(a) companies on a limited competitive basis to the extent feasible and practicable. Price will not be a factor in such competition. It is recognized that in some cases competition will be neither feasible nor practicable due to limited availability of qualified concerns, geographic considerations, or other factors. Section 8(a) subcontracts shall be awarded at prices which are fair and reasonable to the Government and to the subcontractor.

(e) *Program completion and termination.*—A section 8(a) concern which has substantially achieved the objective of its business plan will be notified that its participation in the program is completed. The judgment as to the completion of program participation will be made in the light of the purposes of the program.

If the objectives and goals set forth in the business plan are not being met, the concern shall be informed what corrective measures are necessary. In cases where it is determined, in the judgment of SBA, that continued participation in the section 8(a) program will not further the program objectives, the concern will be notified that its participation in the program is terminated. Reasons which would indicate the necessity for program termination prior to completion of the business plan termination date are, among others: The unavailability of appropriate section 8(a) contracting support; the inability of the section 8(a) concern to develop suitable commercial or competitive markets; inadequate management performance; and evidence of continued inadequate technical performance.

(Catalog of Federal Domestic Assistance Program No. 59.009, Procurement Assistance to Small Business.)

Effective date. This amendment shall become effective on May 25, 1973.

THOMAS S. KLEPPE,
Administrator.

Executive Order 11458

PRESCRIBING ARRANGEMENTS FOR DEVELOPING AND COORDINATING A NATIONAL PROGRAM FOR MINORITY BUSINESS ENTERPRISE

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. *Functions of the Secretary of Commerce.* (a) The Secretary of Commerce (hereinafter referred to as "the Secretary") shall—

(1) Coordinate as consistent with law the plans, programs, and operations of the Federal Government which affect or may contribute to the establishment, preservation and strengthening of minority business enterprise.

(2) Promote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional organizations and volunteer and other groups towards the growth of minority business enterprises and facilitate the coordination of the efforts of these groups with those of Federal departments and agencies.

(3) Establish a center for the development, collection, summarization and dissemination of information that will be helpful to persons and organizations throughout the nation in undertaking or promoting the establishment and successful operation of minority business enterprises.

(b) The Secretary, as he deems necessary or appropriate to enable him to better fulfill the responsibilities vested in him by subsection (a), may—

(1) Develop, with the participation of other Federal departments and agencies as appropriate, comprehensive plans of Federal action and propose such changes in Federal programs as may be required.

(2) Require the submission of information from such departments and agencies necessary for him to carry out the purposes of this order.

(3) Convene for purposes of coordination meetings of the heads of such departments and agencies, or their designees, whose programs and activities may affect or contribute to the purposes of this order.

(4) Convene business leaders, educators, and other representatives of the private sector engaged in assisting the development of minority business enterprise or who could contribute to its development to propose, evaluate, and coordinate governmental and private activities in furtherance of the objectives of this order.

(5) Confer with and advise officials of State and local governments.

(6) Provide the managerial and organizational framework through which joint or collaborative undertakings with Federal departments or agencies or private organizations can be planned and implemented.

(7) Recommend appropriate legislative or executive actions.

SEC. 2. *Establishment of the Advisory Council for Minority Enterprise.* (a) There is hereby established the Advisory Council for Minority Enterprise (hereinafter referred to as "the Council").

(b) The Council shall be composed of members appointed by the President from among persons, including members of minority groups and representatives from minority business enterprises, knowledgeable and dedicated to the purposes of this order. The members shall serve for a term of two years and may be reappointed.

(c) The President shall designate one of the members of the Council as the Chairman of the Council.

(d) The Council shall meet at the call of the Secretary.

(e) The Council shall be advisory to the Secretary in which capacity it shall—

(1) Serve as a source of knowledge and information on developments in different fields and segments of our economic and social life which affect minority business enterprise.

(2) Keep at least of plans, programs and activities in the public and private sectors which relate to minority business enterprise, and advise the Secretary on any measures to better achieve the objectives of this order.

(3) Consider, and advise the Secretary and such officials as he may designate on, problems and matters referred to the Council.

(f) For the purposes of Executive Order No. 11007 of February 26, 1962, the Council shall be deemed to have been formed by the Secretary.

(g) Members of the Council shall be entitled to receive travel and expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5701–5708) for persons in the Government service employed intermittently.

(h) The Secretary shall arrange for administrative support of the Council to the extent necessary including use of any gifts or bequests accepted by the Department of Commerce pursuant to law.

SEC. 3. *Responsibilities of other Federal departments and agencies.* (a) The head of each Federal department and agency, or a representative designated by him, when so requested by the Secretary, shall, to the extent permitted by law and funds available, furnish information and assistance, and participate in all ways appropriate to carry out the objectives of this order.

(b) The head of each Federal department or agency shall, when so requested by the Secretary, designate a senior official to have primary and continuing responsibility for the participation and cooperation of that department or agency in matters concerning minority business enterprise and activities as required by this order.

(c) The head of each Federal department or agency, or his designated representative, shall keep the Secretary informed of all proposed budgets, plans, and programs of his department or agency affecting minority business enterprise.

SEC. 4. *Construction.* Nothing in this order shall be construed as subjecting any function vested by law in, or assigned pursuant to law to, any Federal department or agency or head thereof to the authority of any other agency or officer, or as abrogating or restricting any such function in any manner.

Richard Nixon

THE WHITE HOUSE,
March 5, 1969.

[F.R. Doc. 69-2847; Filed, Mar. 5, 1969; 3:03 p.m.]

34 FR 4937 March 7, 1969

Executive Order 11518

PROVIDING FOR THE INCREASED REPRESENTATION OF THE INTERESTS OF SMALL BUSINESS CONCERNS BEFORE DEPARTMENTS AND AGENCIES OF THE UNITED STATES GOVERNMENT

WHEREAS the policy of the Government of the United States is to insure the continuance of a strong and healthy free enterprise system; and

WHEREAS the existence of a strong and healthy free enterprise system is directly related to the well being and competitive strength of small business concerns and their opportunities for free entry into business, growth, and expansion; and

WHEREAS the departments and agencies of the United States Government exercise, through their regulatory and other programs and practices, a significant influence on the well being and competitive strength of business concerns, particularly minority-owned business concerns, and their opportunities for free entry into business, growth and expansion; and

WHEREAS members of minority groups traditionally have aspired to own their own businesses and thereby to participate in our free enterprise system; and

WHEREAS members of certain minority groups through no fault of their own have been denied the full opportunity to achieve these aspirations; and

WHEREAS the policy of the Executive Branch of the United States Government continues to be, as was described by President Dwight D. Eisenhower, "to strive to eliminate obstacles to the growth of small business"; and

WHEREAS the Small Business Act (72 Stat. 384, 15 U.S.C. 631) declares the Congressional policy that the United States Government should aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns; and

WHEREAS the Small Business Administration is the agency within the Executive Branch of the United States Government especially responsible for and with an established program of advocacy in matters relating to small business; and

WHEREAS section 8(b)(12) of the Small Business Act (72 Stat. 391, 15 U.S.C. 637(b)(12)) empowers the Small Business Administration to consult and cooperate with all Government agencies for the purpose of insuring that small business concerns receive fair and reasonable treatment from such agencies, and section 10(f) of that Act (72 Stat. 393, 15 U.S.C. 639(f)) requires each department and agency of the Federal Government, when requested by the Administrator of the Small Business Administration, to consult and cooperate with the Administration in the formulation by such department or agency of policies affecting small business concerns, in order to insure that small business interests will be recognized, protected, and preserved:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the Small Business Act, it is ordered as follows:

SECTION 1. The Small Business Administration, as the spokesman for and advocate of the small business community, shall advise and counsel small business concerns in their dealings with the departments and agencies of the United States Government to the end that the views of small business concerns will be fully heard their rights fully protected, and their valid interests fully advanced.

SEC. 2. Departments and agencies of the Executive Branch of the United States Government shall call upon the Small Business Administration for advice, guidance, and assistance when considering matters which reasonably can be construed as materially affecting the well being or competitive strength of small business concerns or their oppor-

tunities for free entry into business, growth, or expansion. In taking action on such matters, these departments and agencies shall act in a manner calculated to advance the valid interests of small business concerns.

SEC. 3. The Small Business Administration, whenever it determines that the valid interests of small business concerns so warrant, shall take such action as may be appropriate to insure the timely presentation to departments and agencies of the United States Government of matters materially affecting the well being or competitive strength of small business concerns or their opportunities for free entry into business, growth, or expansion. To this end, the Small Business Administration may participate in investigations, hearings, or other proceedings pending before such departments or agencies and submit evidence, briefs, and arguments in accordance with, and to the extent permitted by, the department's or agency's rules of practice and procedure.

SEC. 4. In performing the responsibilities and duties placed on it by this order, the Small Business Administration shall particularly consider the needs and interests of minority-owned small business concerns and of members of minority groups seeking entry into the business community.

SEC. 5. Nothing in this order shall be construed to authorize the Small Business Administration to act as an attorney for an individual concern in any investigation, hearing, or other proceeding pending before any department or agency of the United States Government. Nothing in this order shall be construed to subject any department or agency to the authority of any other department or agency, to affect the present authority of any department or agency to participate in the proceedings of another department or agency, or to affect the authority of the Attorney General under 28 U.S.C. 519.

SEC. 6. The term "small business concern" as used in this order shall have the same meaning as in the Small Business Act.

Richard Nixon

THE WHITE HOUSE,
March 20, 1970.

[F.R. Doc. 70-3543; Filed, Mar. 20, 1970; 12:43 p.m.]

FR 35-4939 March 20, 1970

EXECUTIVE ORDER 11625

Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise

The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy.

The Office of Minority Business Enterprise, established in 1969, greatly facilitated the strengthening and expansion of our minority enterprise program. In order to take full advantage of resources and opportunities in the minority enterprise field, we now must build on this foundation. One important way of improving our efforts is by clarifying the authority of the Secretary of Commerce (a) to implement Federal policy in support of the minority business enterprise program; (b) provide additional technical and management assistance to disadvantaged businesses; (c) to assist in demonstration projects; and (d) to coordinate the participation of all Federal departments and agencies in an increased minority enterprise effort.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. *Functions of the Secretary of Commerce.* (a) The Secretary of Commerce (hereinafter referred to as "the Secretary") shall—

(1) Coordinate as consistent with law the plans, programs, and operations of the Federal Government which affect or may contribute to the establishment, preservation, and strengthening of minority business enterprise.

(2) Promote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional organizations, and volunteer and other groups towards the growth of minority business enterprises, and facilitate the coordination of the efforts of these groups with those of Federal departments and agencies.

(3) Establish a center for the development, collection, summarization, and dissemination of information that will be helpful to persons and organizations throughout the Nation in undertaking or promoting the establishment and successful operation of minority business enterprise.

(4) Within constraints of law and appropriations therefor, and according to his discretion, provide financial assistance to public and private organizations so that they may render technical and management assistance to minority business enterprises, and defray all or part of the costs of pilot or demonstration projects conducted by public or private agencies or organizations which are designed to overcome the special problems of minority business enterprises or otherwise to further the purposes of this order.

(b) The Secretary, as he deems necessary or appropriate to enable him to better fulfill the responsibilities vested in him by subsection (a), may—

(1) With the participation of other Federal departments and agencies as appropriate, develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by this order.

(2) Require a coordinated review of all proposed Federal training and technical assistance activities in direct support of the minority enterprise program to assure consistency with program goals and to avoid duplication.

(3) Convene, for purposes of coordination, meetings of the heads of such departments and agencies, or their designees, whose programs and activities may affect or contribute to the purposes of this order.

(4) Convene business leaders, educators, and other representatives of the private sector who are engaged in assisting the development of minority business enterprise or who could contribute to its development, for the purpose of proposing, evaluating and coordinating governmental and private activities in furtherance of the objectives of this order.

(5) Confer with and advise officials of State and local governments.

(6) Provide the managerial and organizational framework through which joint or collaborative undertakings with Federal departments or agencies or private organizations can be planned and implemented.

(7) Recommend appropriate legislative or executive actions.

SEC. 2. *Advisory Council for Minority Enterprise.* (a) The Advisory Council for Minority Enterprise (hereinafter referred to as "the Council"), established by Executive Order No. 11458 of March 5, 1969, shall continue in existence under the terms of this order.

(b) The Council shall be composed of members appointed by the President from among persons, including members of minority groups and representatives from minority business enterprises, who are knowledgeable in this field and who are dedicated to the purposes of this order. The members shall serve for a term of two years and may be reappointed.

(c) The President shall designate one of the members of the Council as the Chairman of the Council.

(d) The Council shall meet at the call of the Secretary.

(e) The Council shall be advisory to the Secretary in which capacity it shall—

(1) Serve as a source of knowledge and information on developments in different fields and segments of our economic and social life which affect minority business enterprise.

(2) Keep abreast of plans, programs, and activities in the public and private sectors which relate to minority business enterprise, and advise the Secretary on any measures to better achieve the objectives of this order.

(3) Consider, and advise the Secretary, and such officials as he may designate, on problems and matters referred to the Council.

(f) For the purposes of Executive Order No. 11007 of February 26, 1962, the Council shall be deemed to have been formed by the Secretary.

(g) Members of the Council shall be entitled to receive travel and expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5701–5708) for persons in the Government service employed intermittently.

(h) The Secretary shall arrange for administrative support of the Council to the extent necessary, including use of any gifts or bequests accepted by the Department of Commerce pursuant to law.

SEC. 3. *Responsibilities of Other Federal Departments and Agencies.* (a) The head of each Federal department and agency, or a representative designated by him, when and in the manner so requested by the Secretary, shall furnish information, assistance, and reports to, and shall otherwise cooperate with, the Secretary in the performance of his functions hereunder.

(b) The head of each Federal department or agency shall, when so requested by the Secretary, designate his Under Secretary or such other similar official to have primary and continuing responsibility for the participation and cooperation of that department or agency in matters concerning minority business enterprise.

(c) The officials designated under the preceding paragraph, when so requested, shall review and report to the Secretary upon the policies and programs of the minority business enterprise program, and shall keep the Secretary informed of all proposed budgets, plans and programs of his department or agency affecting minority business enterprise.

(d) The head of each Federal department or agency, or a representative designated by him, shall, to the extent provided under regulations issued by the Secretary after consultation with the official designated in paragraph (b) above, report to the Secretary on any activity that falls within the scope of the minority business enterprise program as defined herein and in those regulations.

(e) Each Federal department or agency shall, within constraints of law and appropriations therefor, continue all current efforts to foster and promote minority business enterprises and to support the program herein set forth, and shall cooperate with the Secretary of Commerce in increasing the total Federal effort.

SEC. 4. *Reports.* The Secretary shall, not later than 120 days after the close of each fiscal year, submit to the President a full report of his activities hereunder during the previous fiscal year. Further, the Secretary shall, from time to time, submit to the President his recommendations for legislation or other action as he deems desirable to promote the purposes of this order. Each Federal department or agency shall report to the Secretary as hereinabove provided on a timely basis so that the Secretary may consider such reports for his report and recommendations to the

President. Each Federal department or agency shall develop and implement systematic data collection processes which will provide to the Office of Minority Business Enterprise Information Center current data helpful in evaluating and promoting the efforts herein described.

SEC. 5. *Policies and Standards.* The Secretary may establish such policies, standards, definitions, criteria, and procedures to govern the implementation, interpretation, and application of this order, and generally perform such functions and take such steps as he may deem to be necessary or appropriate to achieve the purposes and carry out the provisions hereof.

SEC. 6. *Definitions.* For purposes of this order, the following definitions shall apply:

(a) "Minority business enterprise" means a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Esimos, and Aleuts.

(b) "State" means the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

SEC. 7. *Construction.* Nothing in this order shall be construed as subjecting any function vested in, or assigned pursuant to law to, any Federal department or agency or head thereof to the authority of any other agency or office exclusively, or as abrogating or restricting any such function in any manner.

SEC. 8. *Prior Executive Order.* Executive Order No. 11458 of March 5, 1969, is hereby superseded.

Richard Nixon

THE WHITE HOUSE,
October 13, 1971.

[FR Doc.71-15127 Filed 10-13-71;12:28 pm]

36 F.R.19967